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Vol. III

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 638

APEX HOSIERY COMPANY, PETITIONER,

vs.

**WILLIAM LEADER AND AMERICAN FEDERATION
OF FULL FASHIONED HOSIERY WORKERS,
PHILADELPHIA, BRANCH No. 1, LOCAL No. 706**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE THIRD CIRCUIT**

PETITION FOR CERTIORARI FILED JANUARY 12, 1940.

CERTIORARI GRANTED FEBRUARY 26, 1940.

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VOLUME III

In The
DISTRICT COURT OF THE UNITED STATES
For the Eastern District of Pennsylvania

No. 19950.

March Term, 1937.

APEX HOSIERY COMPANY

vs.

WILLIAM LEADER, President of American Federation of Full Fashioned Hosiery Workers (Sometimes known as American Federation of Hosiery Workers), Phila. Branch No. 1, Local No. 706, an unincorporated association, and individually, Joseph Burge, Vice President of said association, and individually, Harry Omeig, Treasurer of said association, and individually, Huey Brown, Secretary of said association, and individually, The American Federation of Full Fashioned Hosiery Workers, (sometimes known as American Federation of Hosiery Workers), Philadelphia Branch No. 1, Local No. 706, an unincorporated association, on behalf of itself and all the members thereof.

Sylvan H. Hirsch, Esq.,
Arno P. Mowitz, Esq.,
Harry G. Sundheim, Esq.,
For Plaintiff.

M. Herbert Syme, Esq.,
For Defendants.

After Recess

Present: Counsel as before noted

JOSEPH C. LANGER, recalled.

Cross Examination (Continued)

THE COURT:

Very well, gentlemen.

BY MR. SIMONS:

Q. Mr. Langer, we were discussing the question of insurance which you have charged up at \$3,186.15. Now, can you tell us the component parts of that insurance?

A. Yes, I will explain how that is done. We take at the beginning of the year—rather, at the end of the year, figure out the prepaid insurance of the respective policies. We do that—

BY THE COURT:

Q. Is that the fire insurance?

A. Yes, fire and—I can tell you, fire and other—that is fire insurance, boiler liability, mercantile burglary, auto truck, pay-roll hold-up, elevator, safe, burglary, transportation, parcel post, position policy, employer's liability, and mercantile burglary open stock.

BY MR. SIMONS:

Q. Now, can you give the amount that you have—well, pardon me, you take the prepaid item and add to that—

A. Add the expenses during the year, and then take the prepaid at the end of the year, and the difference is the amount charged to operations.

Q. Now, can you tell us whether or not there had been any change in rate from the figures that you had in 1936 and those in 1937, policy figures?

A. No, I couldn't—

Q. The rate is the same?

A. I presume they are about the same.

Q. Do you have a record anywheres that will give us the different insurance charges to the various items—

A. I can tell you how much the premium is on these respective policies.

Q. All right, can you do that?

A. Yes.

Q. Do you have it there?

A. I have it here.

Q. May I see it?

A. Yes.

(The witness produced the record.)

BY MR. SIMONS:

Q. Do you have the policies?

A. Do we have the policies here? No.

MR. HIRSCH:

They can be produced if Your Honor thinks it is relevant.

BY MR. SIMONS:

Q. Well, you have here building and contents. I don't know how much of that is building and how much of that is contents. Now, your building and contents premium is for—

A. That is a deposit premium.

Q. You have no other charge for it?

A. No.

Q. What is that \$16,450.00?

A. That is the deposit premium.

Q. For what period of time?

A. Well, that is perpetual, that is, it is adjusted each year.

Q. In other words, you paid \$16,450.00 for fire insurance on a perpetual policy?

A. Well, it is on the factory mutuals, which covers the deposit premium, and each year it is adjusted, based on the losses sustained during the year, and the earnings—

Q. In other words, you mean if you have a fire loss they charge off a certain amount of insurance that you carry, and you pay for the difference?

A. Well, I don't know exactly how they work, only I know that is the basis, they make a deposit premium and each year it is adjusted, and you have that amount on deposit.

Q. Do you have an idea as to what the adjustment is on that fire insurance premium, or is that worked as the regular perpetual policies, that you can surrender any time and get ninety per cent of the amount that you have paid in?

A. I don't know what their value of the policies would be if you surrendered the policy, but the amount we show there prepaid is the amount confirmed to us each year by the company as being the value of the deposit premium as of that particular date.

Q. Well, do you have any record that shows how much you actually paid out in one year for fire insurance on that building?

A. The records would show, the books would

show. There is supposed to be a bill in every year from these people to show how much that additional premium was.

Q. Let me ask you this, did you base your figure that you gave us on the sixteen thousand dollar premium, sixteen thousand, four hundred and fifty dollar premium—

A. Our figures are based upon the value of that policy at the beginning of the year and the value now and the—

Q. No, you don't get what I am asking. When you computed the value of the insurance for the period of May 6th to August 19th—

A. Yes.

Q. —did you use the basis—the premium of sixteen thousand, four hundred and fifty dollars—

A. No, sir.

Q. —in computing that figure? What did you use?

A. Took it for the entire year and apportioned the total expense for the year, which came to \$7,611.09.

Q. Naturally, you only based it on part of the year.

A. Yes, sir.

Q. Based on the \$16,450.00 premium that you have charged here for the year.

A. Yes, but that had a balance similar to that at the beginning of the year, there was a sixteen thousand dollar balance at the beginning of the year.

Q. Let's get this straight. This \$16,450.00 premium you have marked down here August 1st, 1937.

A. That is the policy year, but that wasn't paid that year,—

Q. Wait a second, that is the time that the policy comes in. Now, that policy will run until 1938.

MR. HIRSCH:

Let him answer, Mr. Simons.

A. No, I told you that it is a perpetual policy. That is the policy year, but it is a perpetual policy. They pay sixteen thousand dollars as a deposit premium.

Q. When?

A. At the time that the contract was entered into, several years ago.

Q. All right, and what have they paid every year since that time?

A. That is varying amounts.

Q. Can you let me know what that amount is?

A. I don't know, let's see—Mr. Steeple, do you have the voucher register here?

There are various charges in that prepaid insurance account, but they aren't itemized as of what particular company. However, that could be obtained. If you would want that information we can get it.

Q. Well, now, you take your year 1937. You start off with a charge, a debit, which is prepaid insurance, which means that you paid for that insurance to cover a period in the future?

A. That is right.

Q. And, therefore, as of January 1, 1937 you had prepaid for insurance coverage during part of that year?

A. Now, wait, might I state that that amount there represents two factors? It represents the present value of the—of the fire insurance, the present

value of the deposit premium, and the unexpired premium on other policies.

Q. Well, this is your entire insurance account?

A. That is right.

Q. Now, do you have any other account besides prepaid insurance?

A. No, sir.

Q. You carry no current account, you just use your prepaid insurance account as your regular expense account?

A. That is right.

Q. Now, during the course of the year, at the end of that year—well, let's take at the end of July 31st—you don't have any entry here for August—at the end of July 31st that figure was increased to \$25,025.65.

THE COURT:

What is the total amount of the insurance that you are claiming for?

MR. SIMONS:

Three thousand dollars.

THE WITNESS:

\$3,186.15.

BY MR. SIMONS:

Q. Do you have any idea of what these additional charges of some twenty-seven hundred dollars were for?

A. I couldn't tell what the individual items are unless we had the supporting records to show that. I mean, the amounts are totaled for each month.

Q. Well, now, you have an entry here, July 31st, transferred to strike expense, \$1,609.67. Does that

have anything to do with this figure of three thousand dollars?

A. No, if it is eliminated from the account it did not.

Q. Up here (indicating)?

A. No, that was eliminated.

BY MR. HIRSCH:

Q. Keep your voice up. That was eliminated?

A. That was eliminated.

BY MR. SIMONS:

Q. Now, what do you mean when you say eliminated?

THE COURT:

You mean it doesn't go in the item of \$3,186.15.

BY MR. SIMONS:

Q. Well, was that chargeable to anything else?

A. It was charged in, it was charged in to the strike expense account that we had there, which I believe Mr. Ladenheim examined when he was in the office.

Q. Well, that is not the question, whether he examined it. What is that?

A. I don't know—

Q. To what is that chargeable?

A. From the records here, it has been charged to strike expense. I don't know offhand what it is.

Q. Aren't all of these items charged to strike expense?

A. No, sir.

Q. Or expense during the period of the strike?

A. Yes, but not specifically charged to strike ex-

pense. They are ordinary expense incurred during that period.

Q. In other words, you want us to understand that in addition to the three thousand dollars insurance that you are charging us now in this particular item, you have also charged an item of \$1,609.67 to strike expense?

A. No, sir, because the strike expense account was eliminated from all our calculations. There was an item of sixteen thousand dollars, I believe, for strike expense, which we eliminated entirely, as not being an item for expense incident to hosiery operations.

Q. Well, now, when you closed the books at the end of the year you charged off to profit and loss \$7,611.09 from your insurance?

A. That is correct.

Q. That is correct, and here for a period of at the most fifteen weeks, you are charging—

A. That is correct.

Q. —\$3,186.15?

A. That is correct.

Q. That is correct?

A. That is correct.

Q. In other words, you are telling us now that you are charging us approximately fifty per cent of the insurance during this fifteen-week period as against what you have charged off on your regular books and accounts for the full year?

A. That is right, that is correct, because that portion of the insurance applied to that period, the best we could determine.

Q. In other words, you are telling me now from an accounting point of view as a certified accountant—

A. Yes, sir.

Q. —that allocating insurance for fifteen weeks is going to be a larger amount—will be more than fifty per cent, or approximately fifty per cent of what you would allocate for the full year?

A. Yes, because there is certain expenses in that period there that were properly applicable to that period.

Q. Well, now, if you have fire insurance your fire insurance goes on for a period of twelve months?

A. That is true.

Q. And there is a proportionate charge for each part of the twelve months?

A. That is correct.

Q. So, therefore, that should be proportionate to the amount you charge off for the full year?

A. No, but there are other items in there—

Q. What other items—

MR. HIRSCH:

Now, let him answer, please.

MR. SIMONS:

All right.

BY MR. SIMONS:

Q. What other items are there?

(Discussion at side bar.)

BY MR. SIMONS:

Q. While you are looking, your books show that during 1936 you charged off to profit and loss \$5,752.04 as the insurance for the complete year?

A. What year is that, 1936?

Q. '36.

A. That is probably right.

Q. During 1935 you charged off \$2,664.14 for insurance for the complete year, that is correct?

A. How much do you have for 1935?

Q. \$2,664.14.

A. Yes..

Q. That is correct?

A. Yes.

Q. That is for the full year of 1935, that is your insurance expense?

A. Yes, but then in the corresponding 1934 we had an item of \$7,199.16, so it has fluctuated at times.

Q. Oh, yes, yes, as a matter of fact, according to the books, it is \$7,246.50?

A. That is right.

Q. Well, how about that—

A. I can't locate the analysis, the papers on which we made the allocation, but that was an allocation that was made to the best of our knowledge from the information at that time.

MR. SIMONS:

If Your Honor please, I don't believe that that figure has been properly substantiated, and I at this time move to strike it out.

THE COURT:

It really doesn't seem to me that it is, gentlemen. I just don't follow all this. He made allocations according to accounting practice, but we can't tell what it was and on what basis, and he is not able to give us that information, and I think we might as well strike out that item.

MR. HIRSCH:

Well, if Your Honor please; he gives the information that it was made based on whatever information he had, records, at the time, that he considered it a proper allocation.

THE COURT:

I know, but—

MR. HIRSCH:

That is not an item that should be stricken. It is just simply a question of whether it should be accepted or not, and I think the question of acceptance is for the jury. Here is a man who says that he made this allocation based on the records he had and the information he had and that it was proper at the time. Now, if he is to be believed it is to be accepted. I don't think that is any basis for striking.

THE COURT:

Well, of course, some of it is proper and some is not, or some may not be, and we can't tell.

MR. HIRSCH:

Let's put it this way, that in order to cut the Gordian knot, there seems to be a charge-off to profit and loss of some seven thousand for that year.

BY MR. HIRSCH:

Q. Is that right?

A. That is correct?

MR. HIRSCH:

And I will agree that it should be proportioned on the basis of fifteen fifty-seconds.

MR. SIMONS:

Your Honor, that is not the point involved in this matter,—

MR. HIRSCH:

I have no objection to that.

MR. SIMONS:

—that we are trying to compromise a claim. There has been a claim presented here. There are other claims of a similar nature. If those claims cannot be substantiated I don't think they should be allowed.

MR. HIRSCH:

I withdraw my offer and I stick to the claim.

MR. SIMONS:

I ask Your Honor to strike it out. You can see it is entirely disproportionate to the amount for the full year.

THE COURT:

What was the amount charged for the full year?

MR. SIMONS:

\$7,611.09.

THE COURT:

All right, I will allow fifteen fifty-seconds of that amount.

BY THE COURT:

Q. How much is it? What is the total?

A. \$7,611.09.

THE COURT:

You figure out fifteen fifty-seconds.

MR. SIMONS:

Now, if Your Honor please, may I just say this, that this covers every type of insurance. Now, there is other insurance he has charged through here for which I certainly don't think we are responsible.

THE COURT:

Why not, if they are all parts of the business?

MR. SIMONS:

Wait, he has workmen's compensation charged through here. He has public liability charged through here.

THE COURT:

He had to keep it up, didn't he?

MR. SIMONS:

Oh, no, that is on a pay-roll basis.

THE COURT:

Well, that is true.

MR. HIRSCH:

If we didn't pay it we couldn't charge it.

MR. SIMONS:

Well, I don't know. I will have to check that.

MR. HIRSCH:

Ask him.

BY MR. SIMONS:

Q. What other items—

A. There is nothing in here that we didn't pay.

Q. Don't answer generally. Let me see your distribution of that insurance item. What other items did you consider?

(The witness showed the records to Mr. Simons.)

BY MR. SIMONS:

Q. Where did you get the total of three thousand?

A. What do you mean?

Q. The question is, how do you make up your three thousand dollars? This is just an analysis here, insurance as of December 31, 1937, and doesn't indicate anything about the thirty-one hundred dollar charge.

A. Seventy-six hundred dollars is charged for the year.

Q. That is your profit and loss statement and your work sheets for December 31, 1937?

A. That is correct.

Q. Now, where are your work sheets or where are your papers to show the analysis of the thirty-one hundred dollar item that you are claiming?

A. That is what I am looking for. I can't locate it at the present time.

MR. HIRSCH:

If Your Honor please, you have already ruled this out and have reduced the sum, and he still is—

MR. LADENHEIM:

Who has reduced the sum?

MR. HIRSCH:

The Judge has. The Court has reduced it to fifteen fifty-seconds of the amount.

MR. SIMONS:

I still say, if Your Honor please, we don't

have to be chargeable for workmen's compensation insurance.

THE COURT:

No,—

MR. HIRSCH:

I don't want to object to that if he wants to examine on that.

THE COURT:

Of course, it is almost de minimis, but if the witness can't tell us how he arrived at this figure I don't think we ought to consider any of it, in view of the fact there are undoubtedly some items that should not be charged to it at all. Workmen's compensation is one of them. That is very true.

MR. SIMONS:

Pay-roll robbery insurance that he mentioned.

MR. HIRSCH:

If we didn't lay it out, of course, we couldn't charge. If we had to pay premiums for workmen's compensation during that period it is chargeable.

THE COURT:

I know, but this witness doesn't know; he can't tell.

MR. HIRSCH:

He can tell by looking at the records.

THE COURT:

He says he can't.

THE WITNESS:

That ledger merely shows monthly totals, sir.

BY MR. HIRSCH:

Q. Has that ledger been proved and the totals proved—

A. Absolutely.

Q. —in your audit?

A. Yes.

Q. You examined all the cash disbursements?

A. We have actually vouched all the charges made to that account.

Q. And are you satisfied that that charge was actually incurred and paid for?

A. Actually incurred, yes, sir.

MR. HIRSCH:

I think that is sufficient, sir.

MR. SIMONS:

If Your Honor please, I don't think that is the question at all, as to whether they paid for it or whether it was charged to them and they didn't pay for it. There is no doubt if their records show it was paid, undoubtedly it must have been paid, but that doesn't say we are responsible for it, because they did or did not pay that item. There has not been a proper analysis of this account and I don't think we should be chargeable, and we can't disprove it in any way. You have put the onus of disproving these figures on me, and I can't do it. Therefore, Your Honor, I move again that that entire figure be stricken from the record.

THE COURT:

Well, I will deny the motion.

MR. SIMONS:

Will Your Honor note on there we have no analysis of any of the items making up the insurance?

THE COURT:

Yes.

MR. HIRSCH:

Well, subject to correction, the fifteen fifty-seconds of \$7,611.09 is \$731.70.

THE COURT:

How much?

MR. HIRSCH:

\$731.70.

THE COURT:

Fifteen ~~fifty~~ seconds of what?

MR. HIRSCH:

No, I must be wrong.

THE COURT:

Oh, I should say you are.

MR. HIRSCH:

I will stick to my law and stop accounting.

(Discussion off the record.)

MR. HIRSCH:

\$2,195.10.

THE COURT:

All right, \$2,195.

MR. HIRSCH:

. \$2,195.10, and that will have to be subject to check.

(Discussion off the record.)

MR. SIMONS:

May I ask Your Honor to note the various types of insurance that are being charged in this account, so we don't have to come back to this: building and contents, use and occupancy—and some rider to that use and occupancy, I don't know what it is, there is no notation—boiler liability, mercantile burglary open stock, auto trucks, public liability, property damage, fire and theft on the truck, payroll hold-up, elevator insurance, safe burglary, transportation insurance, parcel post insurance,—position?

THE WITNESS:

Position policy, yes. That is the bond.

BY MR. SIMONS:

Q. You mean fidelity bonds?

A. That is right.

Q. For the employees?

A. Yes, sir.

MR. SIMONS:

Employer's liability.

BY MR. SIMONS:

Q. Is that for merchandise sold, in other words, in case there is any injury resulting from, possibly, dies, or imperfections?

A. I am not certain, offhand,—

MR. HIRSCH:

No.

A. —just what the policy is.

MR. STEEPLE:

It is for outside, anyone hurt on the pavement, or anything of that sort.

MR. SIMONS:

Public liability?

MR. STEEPLE:

Yes.

MR. SIMONS:

Another mercantile burglary policy, open stock, for New York, New York sales office, workmen's compensation insurance.

MR. HIRSCH:

What was the original amount of that item?

THE WITNESS:

The original amount?

MR. SIMONS:

\$3,186.15.

BY MR. SIMONS:

Q. Do you have an analysis of heat, light and power, that you have charged through at \$3,084.46?

A. No, I am not sure, but I believe that is just the proportionate share for the period based on the total amount expended for the year of \$28,974.52.

Q. In other words, let me see your statement for 1937.

(The witness produced a paper.)

BY MR. SIMONS:

Q. You took your heat, light and power over the period for the year 1937, which figure was \$28,974.52?

A. That is correct.

Q. And you apportioned that amount for the period of May 6th to August 19th, is that right?

A. That is correct.

Q. Now, of course, during the months of May, June, July and August it is not necessary to have any heat, is that right?

A. That is correct.

Q. Do you have an idea as to what your heat bill is a year? Let me see your statement ending June 30th.

THE COURT:

What is the heat, light and power item?

MR. SIMONS:

\$3,084.46.

THE COURT:

Well, now, under what theory could you be entitled to claim for the proportionate share of the heat bill, for instance, during the summer months? There isn't any theory, is there?

MR. HIRSCH:

I think if he will break that item down and determine how much of that represents heat that that—

THE COURT:

Well, he says he hasn't done it.

THE WITNESS:

Yes, I have.

MR. HIRSCH:

I think, Your Honor is correct.

MR. SIMONS:

How about the light?

MR. HIRSCH:

Light was being run throughout the time by the sit-downers. We are not going to pay for that if we can help it.

MR. SIMONS:

All right, let's get the heat straightened out, first.

BY MR. SIMONS:

Q. Do you keep a separate account for heat?

A. Yes.

Q. In your ledger?

A. We have a separate account, yes. I have a breakdown as to the different items in there.

Q. What would that be, under "Heat"?

A. Here it is (indicating).

Q. Let's see it in here. Well, you have just one account—

A. Yes.

Q. —in your ledger?

A. Right.

Q. Heat, light and power?

A. That is correct.

Q. Now, do you have a breakdown of that account?

A. Yes, I have how much fuel oil and how much electric. What is the total in the account?

The total charge for heat and light for the year 1937 was \$36,043.87, and through a method of internal accounting we charged \$7,069.35 of that amount to the dye house, leaving a balance in the account of \$28,974.52.

BY MR. HIRSCH:

Q. How much of that was light?

A. And of that, electric, I have here, is \$19,945.12, and fuel oil, \$9,029.40.

BY MR. SIMONS:

Q. What is this item of forty per cent and five per cent?

A. That is to the dye house, which is this amount we take out of there, eliminate, and charge to the dye house.

Q. How about your power?

A. Well, the power is in the electric bill.

BY THE COURT:

Q. Now, then, you have fuel oil of nine thousand dollars. That is what you spent for the whole year?

A. That is correct.

Q. And how much of that did you put in this item of \$3,084.46?

A. The best I can see, Your Honor, is that we took the total for the year there and made this split, I mean, didn't allocate between the fuel oil and electric, but took the total for the year and applied that total to the portion for that period.

THE COURT:

Well, you see, you can't do that.

BY MR. HIRSCH:

Q. Well, what is the ratio of electric to fuel oil in this total? Is it the ratio of \$19,945 to \$9,029?

A. That is correct.

Q. Why don't you take that ratio, then, of \$3,-

084.46?

MR. SIMONS:

Wait a second, who is testifying here? I mean, you have got an expert on the stand for all of this. Are you suggesting a new method—

MR. HIRSCH:

No,—

MR. SIMONS:

—of allocating these items?

MR. HIRSCH:

—I am suggesting a method of determining how much was used for heat, which the Judge wants to know.

THE COURT:

Yes, you see, there are certain items that are susceptible of just being apportioned over the whole year. I don't think heat is one of them.

MR. SIMONS:

I don't think light is.

THE COURT:

That may or may not be.

MR. HIRSCH:

Well, it is a matter of use.

BY MR. HIRSCH:

Q. You have bills from the Philadelphia Electric Company?

A. Yes.

Q. Do you have those bills in court?

A. I don't believe they are in court.

Q. When you talk about your fuel and the power, that operates your motors and your machinery—

THE COURT:

Well, gentlemen, I am going to strike out that item of light, heat and power unless you can establish how much was spent during the period of shut-down for those items.

MR. HIRSCH:

We will establish it.

THE COURT:

As presently proved I will strike that out.

MR. HIRSCH:

All right, I will establish it definitely.

BY MR. SIMONS:

Q. What is your general factory expense, \$83.32?

A. General factory expense, is it?

Q. Yes.

A. We have an item of—

THE COURT:

Would you eliminate that, to save time?

MR. HIRSCH:

Gladly.

THE COURT:

It is eighty-three dollars.

MR. HIRSCH:

Gladly.

THE COURT:

That is withdrawn, whatever it is, right or wrong.

BY MR. SIMONS:

Q. Now, you have another item here of—if I can read—boarding form rental and expense.

A. Yes.

Q. \$1,913.52. What is that for?

A. That is a specific charge made by the Paramount Machine Works, representing a rental on all boarding forms which the company has in their plant on a rental basis. That rental goes on irrespective of whether the plant is operating or not.

Q. Well, do you have a contract with them for that?

A. I can't answer whether you have a contract, but I know there are specific bills in there which specifically state or show the monthly charge which was prevalent during that entire time.

Q. Well, do you know whether or not there is a lease or a contract of some kind to cover that item?

A. If there is, I haven't seen it.

Q. Did you ever see it?

A. No, sir, not to my knowledge.

Q. Did you ever check it?

A. No, sir.

Q. You mean in your audit you merely took the word of the bookkeeper who put down that item?

A. No, sir, we took it from invoices rendered by the Paramount Machine Works.

Q. You didn't take those invoices and see whether the invoices were correct?

A. They were approved by the management.

Q. And you took that as being satisfactory evidence of being a proper charge?

A. Yes, sir.

THE COURT:

I think that is sufficient. I will overrule your objection to that item. Go ahead.

MR. SIMONS:

I would like to see those contracts, if Your Honor please. I don't think that is proper accounting practice.

MR. HIRSCH:

I think it is most proper.

THE COURT:

I think it is all right.

MR. SIMONS:

I must disagree with you, because I think matters of that kind have to be checked with leases.

THE COURT:

All right, I will rule it is all right, subject to your production of the lease and checking of it later.

MR. HIRSCH:

If we have a lease I will gladly produce it. Do we have a lease?

MR. STEEPLE:

We have a lease.

MR. HIRSCH:

Here?

MR. STEEPLE:

Not here.

MR. HIRSCH:

It will be produced.

THE COURT:

All right.

BY MR. SIMONS:

Q. Do you have a record of that on your books?

A. Of what?

Q. That particular item.

A. Boarding form, yes, there is an account called boarding form rental and expense.

Q. Where is it on here?

(The witness indicated the account.)

THE WITNESS:

. It is in that outside wages account.

Q. What is that?

A. It is in the outside wages account. Here you are (indicating).

Q. This is your analysis for the year 1937 of what you call "Outside wages account." Now, in your ledger there is no notation as to what this outside wage account represents, but in your analysis you have it as "boarding form."

That is the Universal Dye Works?

A. That is for boarding. That is an item of boarding.

Q. Now, you note here in May of 1937, in May of 1937 you have Universal Dye Works, boarding, \$60.05. Correct?

A. That is correct.

Q. In April you have \$590.20?

A. That is correct.

Q. Then you come down until August?

A. Yes, sir.

Q. And in August you have \$48.56?

A. That is correct.

Q. Now, there is no charge here for June and July at all, and in August there is only \$48.56, and that is Basal—what was Basal hosiery?

A. No, that has nothing to do—that is another item.

Q. Therefore, August doesn't count at all.

A. Yes, but there is a charge in here, then, in September, \$1,144.40, and I believe that covers—

Q. Well, now, don't believe; do you know whether it does or does not?

A. Offhand I couldn't say, here, but I could get the invoices and prove that item, but I know that there has been a charge every month, all the way through.

Q. When you say you know, you don't have a charge in your analysis here for anything during that month?

A. Not in that month, no.

Q. During May, June, July or August?

A. That is correct, but there is an item appearing in September which will cover that period.

Q. You mean to say that this nineteen hundred dollars is represented in the total of \$1,144.40 that appears in September?

A. Well, I couldn't say that offhand.

Q. Well, you know that that is a practical impossibility. You can't get nineteen hundred dollars out of eleven hundred dollars.

A. That is—

Q. Now, what you have done is merely take the total figure for the year and apportioned a certain percentage to that period from May—May 6th until August 19th?

A. That is possible. I couldn't say offhand.

Q. What is that?

A. That is possible. I couldn't say.

Q. That is possible. Well, your records indicate that there is no charge during those months?

A. That is correct.

MR. SIMONS:

If Your Honor please, I ask that that be stricken from the record.

THE COURT:

Well, no, that is a different thing. If your leases show—

MR. SIMONS:

Well, the records don't show it. The records show there is no charge during that time. In September—

THE COURT:

I know, but suppose he has it for the year, the entire rental, payable in November.

MR. SIMONS:

It isn't on a rental basis, it is on a dozen production basis.

THE COURT:

I don't know.

THE WITNESS:

No, sir, it is so much per form.

MR. HIRSCH:

We will produce the lease form and everything else about it.

MR. SIMONS:

If Your Honor please, the records as they stand now, an analysis made by their own accountant—

THE COURT:

I will strike it out until the lease—

MR. HIRSCH:

You will permit us to produce the information on it?

THE COURT:

Yes. ✓

BY MR. SIMONS:

Q. You have an item of freight and express, \$97.43. What does that amount to?

THE COURT:

Do you want to bother with that?

MR. HIRSCH:

How much?

THE COURT:

\$97.43.

MR. HIRSCH:

Now, go ahead. I don't even know what it is. What was it for?

MR. SIMONS:

Freight and express.

MR. HIRSCH:

All right; out.

BY MR. SIMONS:

Q. You have shipping wages of \$525.00. Do you have that analysis here, to whom it was paid and when it was paid?

A. The pay-roll records are all here, and we could establish who that was paid to.

Q. Can you establish that? We haven't checked the other factory supervision as yet.

A. Well,—

Q. Get the shipping wages. May I just note that you are referring in all of these matters to your annual statement prepared in December 31, 1937?

A. That is correct.

Q. You are not referring now to any analysis that you have made for the period May 6th to August 19th, 1937?

A. Not as such, but as part of our audit for the end of the year.

Q. All right.

MR. HIRSCH:

I would like Your Honor to consider at this time, and allow me to renew my position, again of proving through this witness the actual loss sustained by this company, instead of the profit that it would have made, and therefore we

would ask under that proof for the difference between what we would have made and what we actually lost. By so doing we would take the entire year period and avoid all necessity for allocation, and it would include all our actual expenses and all our actual carrying charges on the entire year, and the difference between what we would have made if permitted to run uninterruptedly and what we actually lost would be the measure of recovery. This method of going into carrying charges is only pursued by me because of Your Honor's ruling. Now, if Your Honor will permit me at this time to put in the proof through Mr. Langer of what our actual losses were, subject to following it up with further testimony by Mr. Meyer as to the amount of business we would have done, in that way we will have the entire picture for the entire year, and there is no question of whether we allocated or did not.

THE COURT:

Well, I am sorry, but it seems to me that that is a more speculative method, and it gets us on a very questionable ground, because you have got to go into all that figure of what you would have done, and that is a very difficult proposition.

MR. HIRSCH:

Well, under the cases, if Your Honor please, what we would have done, all of the cases indicate that when you take a reasonable—

THE COURT:

Well, have you got any decision which al-

lowed damages on that basis? I am following now the decision in the Rice case.

MR. HIRSCH:

No, but we have all of the decisions, if Your Honor please, relating to profits—

THE COURT:

Oh, I know. Well, profits, all right, but the Rice case recognizes profits.

MR. HIRSCH:

—Profits plus the other.

THE COURT:

Yes.

MR. HIRSCH:

Now, if you start with the fundamental principle of law that you are entitled to be made whole—

THE COURT:

Oh, yes, I know, you have made that argument. It is all right, it has some basis in logic, but I think we better do it this way.

MR. HIRSCH:

All right, I intend to prove it the other way also, after we have proved what the profits were. I mean, I think we are entitled to the entire spread for the year. I think we are entitled to be made whole for the year.

THE COURT:

Well, I am trying to allow what seems to me to be a proper way to do.

What are we looking for now?

THE WITNESS:

Looking for the shipping wages. Total shipping wages for the year was \$9,216.39, and we have allocated \$525.00 to that particular period, but I can't—

BY MR. SIMONS:

Q. How much was that?

A. For the whole year?

Q. Yes.

A. Ninety-six hundred—

BY MR. HIRSCH:

Q. Ninety-six hundred?

A. Yes, ninety-six—\$9,216.39.

BY THE COURT:

Q. Well, do you know that that much was spent during that period?

A. That was for the entire—yes, there was some basis for making the allocation, Your Honor, but I can't just locate it for the moment. There must have been some purpose for making that allocation; only a small amount, five hundred and twenty-five dollars, but I can't locate it offhand.

THE COURT:

Well, go ahead.

MR. HIRSCH:

Well, it is obvious that it could not have been allocated on a 15/52 basis,—

THE COURT:

No, that is all right.

MR. HIRSCH:

—so it must have been on actual—

MR. SIMONS:

If Your Honor please, unless we know just what it is about or how it is allocated I will have to ask that that be stricken out.

THE COURT:

I will strike out shipping wages—of how much?

MR. SIMONS:

\$525.00.

MR. HIRSCH:

Subject to further proof, is that right?

THE COURT:

Well, yes, if you think it is worth while.

MR. HIRSCH:

Well, we will see.

BY MR. SIMONS:

Q. Now, you have an item of twelve hundred dollars as traveling expenses, Mr. Langer. Will you turn to that and let us know what that is?

A. What is the traveling expense?

Q. \$1200.00.

THE COURT:

Let's see the thing that you are examining from. I want to see how many items there are.

THE WITNESS:

What is the total amount of that, Mr. Simons?

MR. SIMONS:

\$1200.00.

THE WITNESS:

I mean for the entire year.

MR. SIMONS:

I don't know. You have the figures there. I only have it for that period.

THE COURT:

Well, isn't there some way you can get this in some kind of shape so you can refer to it promptly? It takes twenty minutes to look up every item here.

BY MR. HIRSCH:

Q. If the thing went over night could you get it in shape?

A. Well, I can explain that item now.

Q. All right.

A. On this traveling expense, there was New York, thirty-nine hundred dollars.

BY MR. SIMONS:

Q. Well,—

A. I will have to give it for the year—thirty-nine hundred dollars, and from miscellaneous traveling expenses of Mr. Steeple and the others around the plant, \$468.75, making a total of \$4,368.75.

Q. That is what you have charged here in the records, \$4,368.75?

A. Yes, sir.

Q. For the full year?

A. That is correct.

Q. Now, you, therefore, proportioned it for that period of twelve hundred dollars arbitrarily?

A. For that period, twelve hundred dollars.

THE COURT:

Well, I don't think you can do that with traveling expenses. I will strike that out.

BY MR. SIMONS:

Q. Sales office rent and expense, \$950.00, is your next item.

A. That is New York sales office.

Q. Does that relate to your New York sales office?

A. Yes, sir.

MR. SIMONS:

If Your Honor please, do you want me to go further on the question of the New York sales office expense?

THE COURT:

Oh, yes, why not? It was perfectly useless during that period, wasn't it?

MR. KATZ:

Oh, no.

THE COURT:

Why?

MR. KATZ:

Oh, no. I do know—

THE COURT:

Well, we will have to bring that out. I don't know.

THE WITNESS:

The total for the year was \$3,730., of which \$1,560. was for the clerk, salary of a clerk, \$1,320., for rent, and \$850. for miscellaneous expense.

BY MR. SIMONS:

Q. And you have simply allocated nine hundred and fifty dollars for that particular period of time?

A. That is perhaps right.

MR. HIRSCH:

That is correct. That is the only way it can be determined. That is a fixed charge for the year, and it is allocated according to the—

THE COURT:

Yes, I guess it is.

BY MR. SIMONS:

Q. Well, now, Apex has another plant, do they not, in Spring City?

A. Apex have another plant?

Q. Yes.

A. No, sir.

Q. They have another plant in Spring City?

A. Apex don't have another plant in Spring City.

Q. Is there another plant in Spring City that is under the direction or supervision of the Apex Company?

A. No, sir.

Q. Was there in 1937?

A. Not under the supervision of the Apex Hosiery Company?

Q. Under the supervision of whom?

A. I don't know.

Q. Well, you know there is a plant in Spring City?

A. There is a plant, yes, there is a plant in Spring City.

Q. And you know that the sales office sells merchandise from that plant in Spring City?

A. I do not, no.

Q. Do you know anything at all about this New York Office?

A. No, sir.

Q. You don't know anything about their operations?

A. No, sir.

Q. Don't know anything about their expenses?

A. No, sir.

Q. And as far as you know, they may be selling seventy-five other items in addition to the hosiery of the Apex Hosiery Company?

A. They may.

Q. And you haven't checked up on that at all?

A. No, sir.

Q. All you have are the figures that they told you to charge to that particular account?

A. Yes, sir.

THE COURT:

Well, I guess I will have to strike that out.

MR. HIRSCH:

No, if Your Honor please, unless they show that this charge was for other than the Apex Hosiery, and they haven't shown that yet.

MR. SIMONS:

If Your Honor please, I can't assume a burden of that kind.

THE COURT:

Gentlemen, why don't you let me rule? I will strike it out. I think the burden is on the plaintiff to show that this sales office was devoted entirely to the sale of hosiery from the Apex plant.

MR. HIRSCH:

May I interrogate the witness, or I will put another witness on the stand who will show that fact?

BY MR. HIRSCH:

Q. In other words, was any charge made on the books of the Apex Hosiery Company covering its New York sales office, for any activities of that office other than its activities for the Apex Hosiery Company.

MR. SIMONS:

If Your Honor please, he has answered that. He says he doesn't know, except he was told those were the charges.

THE COURT:

Don't interrupt. We all want to get the correct picture.

MR. SIMONS:

The facts—

THE COURT:

We don't want the witness to do himself or

anyone any injustice. We want to get this correct picture of what he did here if we can.

Now, go ahead and answer that question.

BY THE COURT:

Q. Do you know?

A. Would you mind repeating—

Q. Do you know whether that item of thirty-seven hundred and thirty dollars included any expense which would be properly chargeable to anything other than Apex sales, or don't you know, or do you know anything about it?

A. All I can answer to that question is, that represents the salary of a girl over there. Now, whether the girl has—whether the office handles any other business outside of Apex, I don't know.

Q. Does that represent her total salary?

A. That is her total salary for the year, \$1,560.00. It is thirty dollars a week for the fifty-two weeks.

BY MR. HIRSCH:

Q. And the rent is for the entire office?

A. And the rent is for the entire office for the year.

THE COURT:

All right, I will strike it out, subject to further proof.

MR. HIRSCH:

All right, I will get that.

BY MR. SIMONS:

Q. Now, you have an item of salesmen's salaries, \$3,750. Do you have the allocation of that?

A. Yes, that is the salary of the New York salesman, Mr. Saupe.

Q. And he gets thirteen thousand dollars a year?

A. He gets thirteen thousand, that is right. What is the total charge on that—

Q. Thirteen thousand, here. (Indicating).

A. Yes, that is right.

Q. Do you have that in these books anywhere?

A. Well, it is traveling expense—

Q. You mean everything appears in this one item?

A. Yes.

Q. All right. Now, have you had any personal contact with this salesman in New York?

A. No, sir.

Q. Do you know anything about him at all?

A. No, sir.

Q. Know what he does in New York?

A. No, sir.

Q. Know whether he sells any merchandise of any other manufacturers?

A. No, sir.

Q. All you know is that that item appears on the books?

A. Yes, sir.

MR. SIMONS:

If Your Honor please, I make a similar motion as to that item.

MR. HIRSCH:

If Your Honor please,—

THE COURT:

This is a different situation.

MR. HIRSCH:

Certainly. Here is an auditor who checked the books. He doesn't know whether so many dozen were produced; he could be asked, "Do you know, when you testified there were four hundred and four thousand dozen, did you see them?"

THE COURT:

I wasn't thinking so much about that, but here is a full-time employee, and he may do some little other things, but I will—

MR. SIMONS:

If Your Honor please, before you rule on that—

THE COURT:

No,—

MR. SIMONS:

—my thought is this,—

THE COURT:

—I—

MR. SIMONS:

—that this New York office does more than sell hosiery only for Apex.

THE COURT:

I don't know that.

MR. SIMONS:

I know you don't. I don't, either. They haven't presented the proof. The burden is on them to prove it, not on us to disprove it.

THE COURT:

I will overrule your objection as to this item.

BY MR. SIMONS:

Q. Now, you have salaries of officers, \$10,125. Can you tell us what that is?

A. Salaries of officers—that would be Mr. Meyer. Yes, that is Mr. Meyer.

Q. In other words, his salary for the year is thirty-five thousand, one hundred dollars, and you have apportioned an amount for that fifteen-week period?

A. I believe that is right.

Q. Do you know whether or not Mr. Meyer spent any time up in Spring City?

A. No, I don't.

Q. Do you know whether or not Mr. Meyer spent any time in New York at the New York office?

A. No, sir, not definitely.

Q. You know Mr. Meyer does spend time in the New York office, don't you?

A. I know Mr. Meyer makes trips to New York frequently, but what he does and where he spends his time I don't know.

THE COURT:

Well, there is no evidence that Apex owns any other plant.

MR. HIRSCH:

And it does not.

THE COURT:

The evidence is that it does not. Go ahead.

BY MR. SIMONS:

Q. Do you know that Mr. Meyers spends some time in the Chicago office?

A. I don't know.

THE COURT:

The fact of the matter is, I think I was wrong in striking out that item of \$950. for office rent and expense in New York, and I will change the ruling on that and overrule your objection, and allow that to stand.

MR. SIMONS:

If Your Honor please, don't you think—

THE COURT:

Oh, please don't argue it after I have ruled.

MR. SIMONS:

All right.

THE COURT:

Now, we can't spend our time listening to arguments about it. If I am wrong about it you have your remedy.

BY MR. SIMONS:

Q. Office salaries of \$8,243.40; what does that represent?

A. That would be salaries of the office employees of Apex.

Q. Do you have the pay-roll schedule for that?

A. We have the pay-rolls.

Q. May I see them?

A. Yes, sir.

(Discussion off the record.)

THE WITNESS:

\$8,243.40?

MR. SIMONS:

Yes.

* (Discussion off the record.)

THE WITNESS:

That represents the salaries of the people in the—the clerks in the office.

BY MR. HIRSCH:

Q. Actually paid during that period?

A. Actually paid during that period, yes, sir.

BY MR. SIMONS:

Q. They were not all working during that period, were they?

A. Yes, sir, they were.

Q. Of the office?

A. Yes, sir.

THE COURT:

Well, I don't believe it is material whether they were all working or not. If they had to be paid in order to keep the organization together, whether they worked or not, it would be a proper charge.

BY MR. SIMONS:

Q. Now, these sheets aren't just the office sheets, are they?

A. Yes, sir, they are just—well, there is other salaries on there besides the office.

Q. Well, you have Carl Hoch here, and William Ludwig?

A. That is right.

Q. They are engineers, aren't they?

A. That is the foremen and foreladies.

Q. Now, wasn't the office force in the plant before August 19th, 1937?

A. I don't recall the date when they came back.

Q. Well, didn't they come back to the plant before that time?

A. I don't recall the date.

Q. Weren't they working in the office before then?

A. Before when?

Q. August 19th, 1937?

THE COURT:

Well, I don't think that would make any difference, if they were. What difference does it make? The plant wasn't turning out any product, it wasn't manufacturing anything.

MR. SIMONS:

Well, they were certainly doing a certain amount of work required in the office, the regular routine of the office, and we shouldn't be charged with the full amount of their salaries.

THE COURT:

I don't see why not, if they had to be paid during the period when there was nothing going on.

MR. SIMONS:

But there certainly was something going on, at least after they got into the plant, for that period of time.

MR. HIRSCH:

That is right, we were repairing damage.

MR. SIMONS:

Thanks for the comment, Mr. Hirsch, I think it helps the situation quite well.

I think that certainly the last month's salaries that they have charged here was the time when they were in the plant and they were doing work that would be necessary for their operations. I can't see where some of that they were paid where they may or may not have been doing any productive work.

THE COURT:

Well, it is hard to arrive at a correct—

MR. SIMONS:

I didn't get that, Your Honor.

THE COURT:

It is difficult to arrive at an absolutely correct—

MR. SIMONS:

It isn't so difficult, because we find this, that the charges during the early part of the term, May 14th to 21st, were \$646. a week, and similar charges are made on the pay-roll of August 20th, of \$599., the 13th, of \$626., so they really charged us for the full pay-roll during the latter part, at the time when they were back in the office, whereas we vacated the office on the 23rd. Let's say the matter was finally terminated on—when was it, September 29th, wasn't it?

MR. HIRSCH:

What?

MR. SIMONS:

July 29th, so you have a period of at least three pay-rolls, which amount to around eighteen hundred dollars.

MR. HIRSCH:

If Your Honor please, even admitting that they were back—I don't know when they came back—even admitting they were back and working, if, on the other hand, we were not able to produce and bring in any income as a result of our production activities to offset the expense, it is a necessary expense during the shut-down.

THE COURT:

All right, I will allow it.

MR. HIRSCH:

The same as every other one.

MR. SIMONS:

You are allowing the item, if Your Honor please?

THE COURT:

I think so.

MR. SIMONS:

Grant me an exception.

BY MR. SIMONS:

Q. You have a telephone item of \$241.39—

THE COURT:

How much is this pay-roll?

MR. SIMONS:

\$8,243.40.

A. The total telephone charge for the year was \$1,856.25, and I believe that was allocated on a proportionate basis of that period.

MR. HIRSCH:

Well, that couldn't have been, because you are only charging \$241. and that is not fifteen fifty-seconds. That would be one-eighth, and it is one-third of the year, so it couldn't have been that.

THE COURT:

Well, you will have to prove it the other way, you will have to prove what was actually spent, if you think it is worth while.

THE WITNESS:

We can get it.

MR. HIRSCH:

We will prove that tomorrow.

THE COURT:

Do you want to bother with it? It is only two hundred and some dollars.

MR. HIRSCH:

It is a stand-by charge for the telephone that had to be paid.

MR. SIMONS:

Well, Mr. Hirsch, will you please stop testifying?

THE COURT:

Some of it was, some of it may have been long distance calls, but it does seem to me, gentlemen, it is really not worth our while. Here you have some items worth talking about, two or three

L

thousand dollars. When you talk about an item of telephone charges, two hundred and fifty dollars, it just seems quite futile to sit here and bicker about it.

How much was the telephone charge?

MR. SIMONS:

\$241.39.

THE COURT:

Just think of it!

MR. HIRSCH:

All right, go to the next. For the moment Your Honor may strike it out, subject to our desire to re-prove it.

THE COURT:

Oh, yes. It isn't worth re-proving.

BY MR. SIMONS:

Q. Now, you have a charge for legal and accounting of \$1,588.28.

A. That is right. The total for the year—

Q. Now, wait a second.

MR. SIMONS:

Do you think that is a proper charge?

MR. HIRSCH:

How much is it?

MR. SIMONS:

\$1,588.28.

MR. HIRSCH:

I will ask him a question.

BY MR. HIRSCH:

Q. Does that "legal" cover any extraordinary services by reason of the strike?

A. No, sir.

BY THE COURT:

Q. What is that, annual retainer?

A. Yes, sir, and accounting fees.

THE COURT:

All right.

MR. HIRSCH:

Then I press it.

THE COURT:

That is all right.

BY MR. SIMONS:

Q. Let me see the charge, will you, please?

A. Well, twenty-four hundred of it—

Q. Let me ask you something. Don't these items appear in your general ledger anywheres?

A. No, because they are all in general expense.

BY THE COURT:

Q. All right, now, tell us about this. Go on.

A. The accounting bill is twenty-four hundred dollars, that is our bill, and the remainder is legal fees.

Q. And they are both annual charges?

A. Yes, sir, that is a portion of the legal fees. I don't know exactly, offhand, how much the retainer fee is. Maybe Mr. Steeple can tell you now how much that is, but the rest of it is actual charges made during the year for legal fees.

MR. HIRSCH:

What is the actual retainer?

MR. STEEPLE:

About twelve hundred and fifty.

MR. HIRSCH:

The retainer is?

MR. STEEPLE:

Yes, twelve hundred and fifty per year.

MR. HIRSCH:

I think we are only entitled to a proportion of the retainer and a proportion of the other charges. Will you figure that out and proportion it on a fifteen fifty-seconds basis?

MR. SIMONS:

That would be about twelve hundred dollars at the most.

MR. HIRSCH:

What was the total of that item in the beginning?

MR. SIMONS:

Fifteen hundred.

THE COURT:

How much of that comes out?

THE WITNESS:

\$1,588.28.

MR. HIRSCH:

\$1,050.00, Mr. Ladenheim says. I will accept that, instead of \$1,588.28.

THE COURT:

How much do I strike out?

MR. HIRSCH:

\$538.28.

THE COURT:

All right.

(Discussion off the record.)

BY MR. SIMONS:

Q. You have office expense of \$309.61. What does that represent?

A. That would be miscellaneous office expense which for the year totaled \$1,698.66.

Q. And you proportioned for that period of time?

A. I would say offhand, yes.

MR. SIMONS:

If Your Honor please, I don't think that that is a proper charge.

BY THE COURT:

Q. Well, what does it mean, paper and pencils?

A. Just miscellaneous stationery and supplies.

MR. SIMONS:

We have been charged with the bill for all of that in the other item.

MR. HIRSCH:

No.

MR. SIMONS:

We have refurnished the whole office.

THE COURT:

I will strike it out. Office expense, how much was it?

MR. SIMONS:

\$309.61.

THE COURT:

\$309.1

MR. SIMONS:

Yes.

THE COURT:

All right.

BY MR. SIMONS:

Q. How about the item of postage, was that proportioned the same way?

A. Presumably, yes.

MR. SIMONS:

I ask Your Honor—

THE COURT:

How much was that?

MR. SIMONS:

\$337.34.

THE COURT:

Strike it out.

BY MR. SIMONS:

Q. Dues and subscriptions, \$1,743.03.

MR. HIRSCH:

Do you want to know what that is?

MR. SIMONS:

That is what I asked him.

A. That represents in part the National Association of Hosiery Manufacturers annual dues.

BY MR. SIMONS:

Q. As annual dues; where is it in your general ledger?

A. It is all part of general expense.

Q. Well, where in your general expense does it appear? I can't seem to find—

A. You can't find it there, because the account must be analyzed in detail to ascertain these items.

Q. Well, how did you make up your analysis from this? You don't take care of these books daily?

A. No, when I make the audit I analyze the account for each individual item appearing therein.

Q. Where is the analysis of general expense?

A. Right here (indicating).

Q. Appearing in your work sheets?

A. Right here.

Q. Let me see it.

(The witness produced the analysis.)

BY MR. SIMONS:

Q. This is an analysis of this general expense?

A. That is correct.

Q. Railway Audit, \$7,343.55?

A. That is correct.

Q. Now, did you charge part of these general expenses on these—on this item that we have here? In other words, you took this general expense account and charged us proportioned on the various items that you have here?

A. Yes, sir, the various items.

Q. Now, who is the Railway Audit?

BY MR. HIRSCH:

Q. Was that charged in this account, in this—

A. No, sir.

MR. HIRSCH:

I object to that question, then, if it wasn't charged for in this account.

MR. SIMONS:

Well, he just said that it was. He said that he charged a proportion for all these things.

THE COURT:

No,—

MR. HIRSCH:

He said, "No, sir".

THE COURT:

He said, no.

MR. HIRSCH:

Objected to.

BY MR. SIMONS:

Q. Where does this Railway Audit appear in this general expense account?

MR. HIRSCH:

That is objected to because it is not an item for which we are asking reimbursement.

MR. SIMONS:

If Your Honor please,—

THE COURT:

All right.

MR. SIMONS:

—I am trying to check this. I can't do it.

THE COURT:

That is all right.

MR. SIMONS:

I have been trying to check it and I can't do it.

BY MR. SIMONS:

Q. Show me where it appears in this general expense account.

A. I can't show it to you. It is part of the items—I would have to get the cash—

Q. Well, show me the component parts of it, so I can read the general ledger.

A. Do you have the cash book?

THE COURT:

Let me ask you, gentlemen, the entire claim for this period on the overhead, as I have it down here—am I correct? —is one hundred and twenty-two thousand?

THE WITNESS:

That is correct.

THE COURT:

Well, now, if you take every one of these items and add them up, that have been objected to, I don't believe it adds up to twenty thousand dollars, and of those there is a probability or likelihood that you can support quite a number of them. Can't you make a general agreement as to how much of it is really not subject to attack? Of course, I understand that you don't admit any of it, but—

MR. HIRSCH:

Well, the items that have been eliminated to—

tal approximately about seventy-five hundred dollars,—

THE COURT:

No,—

MR. HIRSCH:

Plus some of the ones that we intend to prove.

THE COURT:

Well, I say—seventy-five hundred—suppose you cut it down by fifteen thousand, it would leave you with one hundred and seven thousand dollars of items in this claim. I don't know that it would make much difference. However, do as you please about it. We could save a great deal of time.

MR. HIRSCH:

If this will end a long examination and get on with the case, and you think that is the way to do it, I have no objection, if it is agreed to.

THE COURT:

Well, do you expect to be able to exclude more than, say, fifteen thousand dollars of this item?

MR. SIMONS:

I don't know, if Your Honor please. We are being charged. We are, very frankly, on the defensive here, at all times. We were given total figures, and told, "Now, you go ahead and disprove them." Now, I have to try to disprove them, and I think it is more important, even, than a question of dollars and cents to show that they are charging us with everything possible, they have taken accounts of this kind and broken the accounts down and charged us

with everything along the line in a proportionate manner.

THE COURT:

No, not in every case. Well, in many cases it was a proper way to do.

MR. SIMONS:

In some few it might have been, where there were definite fixed expenses that could not be allocated.

THE COURT:

Yes, well, I don't care, go ahead.

I think we will recess for ten minutes.

(Recess at 3:30 o'clock P. M.)

JOSEPH C. LANGER, resumed.

Cross Examination (Continued)

BY MR. SIMONS:

Q. Are you prepared now to show me the analysis of this general ledger account?

A. Yes.

Q. And how you make-up this item?

MR. HIRSCH:

What is the item called, and how much is it?

MR. SIMONS:

Railway Audit Account, \$73—

MR. HIRSCH:

That is objected to,—

MR. SIMONS:

\$7,343.55.

MR. HIRSCH:

—because there is no charge being made for it.

THE COURT:

Well, there is no charge being made for it. It may just have a bearing on something, I don't know.

MR. HIRSCH:

Well, I would like Mr. Simons to state what it is to Your Honor at side bar.

THE COURT:

Well, he may want to show that the accountant has made a big mistake somewhere else, and therefore there are a lot of mistakes here, I don't know.

MR. SIMONS:

I, frankly, want to check that item against the general ledger. I have been trying to check these items.

THE COURT:

Go ahead, I will permit you to ask the question.

BY MR. SIMONS:

Q. Show me where that Railway Audit Account appears in the general ledger and how it is made up. Show me in the general ledger here, and not your work sheets.

A. All right.

Q: 37, we are in.

A. It comes probably from the cash book, and

it would be contained in the various items from the cash book.

MR. HIRSCH:

May I see Your Honor at side bar for a moment?

THE COURT:

Yes; sir.

(The following occurred at side bar:

THE COURT:

It appears from counsel's statement that this Railway Audit item is an item of payment for detectives and other services which might be argued to be strike breaking agencies. I didn't know that when I originally ruled. If this is so, the prejudice or effect seems to me to be sufficient consideration to justify the Court in sustaining the objection, particularly in view of the fact that there is no claim whatever being made for any part of this item, and of the fact the effect upon the witness' credibility is extremely remote, so I will sustain the objection.

MR. SIMONS:

May I just say this, we are being charged with the item, because they say they have lost so much during 1937, and that is an item of charge.

THE COURT:

No, it is not, they are not saying they lost so much, they are not proving on that theory at all. They are not proving for loss. They are proving for loss of profits plus expenses that

were non-productive because of the idleness of the employees of the plant.

MR. HIRSCH:

Correct.

THE COURT:

Now, that is a different theory from that which Mr. Hirsch originally propounded, and this is the theory which the Court has adopted, so that there is no possible basis for any part of this account being charged against the defendants.

MR. KATZ:

May I say on the point, Your Honor, that we are entitled to the evidence on this point inasmuch as it may very well bear upon other questions in the case bearing on liability.

MR. HIRSCH:

Nothing to do with the cross examination of this witness.

MR. KATZ:

An item appears. We have the right to get full details of what that item means.

MR. HIRSCH:

No, sir.

MR. KATZ:

May I complete my statement?

MR. HIRSCH:

I beg your pardon. Go ahead.

MR. KATZ:

And to deprive us of the right of cross examining one witness is to divide the case into sections.

THE COURT:

Well, the only theory on which you would be entitled to cross examine on this would be that you would be entitled to cross examine upon every item appearing in the books at any point, regardless of whether any claim is being made in connection with that or not, and I think the Court has the discretion to limit the cross examination to matters reasonably relevant to the items claimed, and particularly in view of the fact that other issues may be introduced which have nothing to do with this case, but may be prejudicial, and, therefore, I will sustain the objection.)

BY MR. SIMONS:

Q. What is the last item of discussion?

A. Item of dues and subscriptions.

Q. Do you have a dues and subscription account in your general ledger?

A. No, that is also part of the.—that is also part of the general expense.

MR. HIRSCH:

Mr. Langer, all these people want to hear you.

THE WITNESS:

That is also part of the general expense. I am sorry.

BY MR. SIMONS:

Q. Now, will you show us the breakdown of the dues and subscriptions in your general ledger? By the way, where are the sheets of this general ledger prior to May 31, 1937?

A. I presume they are in the transfer.

Q. May we have those transfer sheets?

(The sheets were produced by Mr. Steeple.)

BY MR. SIMONS:

Q. Now, can you give me the breakdown of that item in the general ledger?

A. Breakdown?

Q. Yes, I want to know how you got that figure.

A. All right, I can show you how it is gotten.

Q. Wait a second, dues and subscriptions, what is the total?

A. Two thousand—

Q. \$2,078.?

A. That is right.

MR. HIRSCH:

How much is the item we are charging you with?

MR. SIMONS:

You are charging us with \$1,743.03.

MR. HIRSCH:

All right, now, explain it.

THE WITNESS:

There is five hundred dollars in April, making up the \$1,183.20.

BY MR. SIMONS:

Q. Now, wait a second, in April, you said \$1,183.20?

A. No, over in '37.

Q. Here is '37. Here it is in this transfer sheet. \$1,183.20?

A. That is right.

Q. 395 means what?

A. That is the cash book.

Q. Do you have your cash book?

A. Yes, sir.

Q. Can we see 395?

BY MR. HIRSCH:

Q. You say five hundred dollars of that item is charged in this \$1,743.?

A. That is part—five hundred dollars of that is Association dues.

(Mr. Steeple produced the paper requested.)

MR. SIMONS:

Now, wait a second, just a second, let me just look at this a second.

BY MR. SIMONS:

Q. All right, now, let's see how you pick this up.

A. (Indicating) Made-in-America Club.

Q. That is, on April 12th, I guess, on April 12th, 1937, you paid five hundred dollars to the Made-in-America Club. Do you know anything about this Made-in-America Club, Incorporated?

A. No, sir.

Q. Do you know the purpose or function of that organization?

A. No, sir.

Q. Do you know whether or not this was merely a donation?

A. I do not.

Q. Where is the rest of the item?

A. In June you will find an item for a thousand dollars.

MR. HIRSCH:

In June? Keep your voice up.

THE WITNESS:

In June.

BY MR. HIRSCH:

Q. How much?

A. In June you will find an item of a thousand dollars.

BY MR. SIMONS:

Q. June, when?

A. 1937.

Q. Full Fashioned Hosiery Association; do you know what that represents?

A. No.

Q. Do you know whether that was a donation or a contribution, or what that might have been?

A. No. I saw the invoices there. I think the invoices fully describe what they were.

Q. Do you have the invoices?

A. I don't believe we have the invoices here, but we could support it.

Q. All right, now, what other item do you have?

A. In October, an item of two hundred and fifty dollars.

Q. Also payable to the Full Fashioned Hosiery Association?

A. That is what it is marked here.

Q. Any other item?

A. There is an item in December.

Q. How much?

A. \$328., Full Fashioned.

Q. Also made to Full Fashioned Hosiery?

A. That is correct.

Q. Do you know anything about that?

A. No, sir.

Q. Do you know the reason or the nature of those charges?

A. Not offhand.

Q. Do you know who this association is?

A. No, sir.

Q. Do you know anything at all about that?

A. No, sir.

Q. That is a total of \$2,078.?

A. That is correct.

Q. And you charge here \$1,743.03.

A. There is some—there are some additional items in the vouch register which we will have to bring in. We don't have the vouch register here, but there is \$5,219.19 charges from the vouch register.

Q. Well, what is that for? \$5,—

A. 219.19.

Q. And when was that?

A. That was all during the year 1937.

Q. What date, do you know the date?

A. Well, all during the year.

Q. Do you have the analysis under your dues and subscription account?

A. I am just looking.

Q. Here it is?

A. No.

Q. All right, do you know what that item represents?

A. No, I would have to get the vouch register to support the details on that. I mean, I would have to get the vouch register to give you the breakdown on that figure.

Q. Do you know to whom it was paid?

A. Not offhand.

MR. SIMONS:

If Your Honor please, I don't believe that this whole item or any part of this item is chargeable to us as an expense. Now, here are payments made to a Made-in-America Club, Incorporated, to Full Fashioned Hosiery Association, Incorporated, and in various sums, and another item the details of which we know nothing about. Now, they may have been purely contributions on their part. They have a perfect right to do as they please with their money but not to charge us with it.

THE COURT:

Have you anything to say?

MR. HIRSCH:

Was that the National Association or the Full Fashioned?

MR. SIMONS:

This is Full Fashioned Hosiery Association.

MR. HIRSCH:

That is what I want to find out.

MR. SIMONS:

Yes, well, I copied that from the book, Mr. Hirsch.

MR. HIRSCH:

It is Full Fashioned in October. What was it in June?

MR. SIMONS:

On June—thousand dollars—June 9th.

MR. HIRSCH:

What was that, to whom?

MR. SIMONS:

Full Fashioned Hosiery Association.

MR. HIRSCH:

Check that June item, will you?

MR. SIMONS:

Here it is. Here you are, Sylvan.

(Discussion off the record.)

MR. HIRSCH:

I am going to leave this up to Your Honor. I find that the Made-in-America five hundred dollars was a contribution. I don't think the defendants should be charged with that.

THE COURT:

Strike it out.

MR. HIRSCH:

The three payments to the Full Fashioned Hosiery Association in June, October and December represented assessments by that association of which the Apex was a member, and I think that is—

THE COURT:

Yes, I think that is—

MR. HIRSCH:

I think that is a proper charge.

THE COURT:

So do I.

MR. HIRSCH:

\$5,219.19, we don't have the supporting data, and it should be stricken out until we do.

THE COURT:

How much does that reduce that item?

MR. HIRSCH:

That makes \$1,578, and that will have to be proportioned.

THE COURT:

How much does it reduce—I am keeping track—

THE WITNESS:

This is the amount for the year.

BY MR. HIRSCH:

Q. What would the proportion be?

MR. HIRSCH:

Well, in round figures—let's save time—it would be about five hundred dollars, so the item of \$1,743.03 would be reduced by \$1,243.03, unless we prove further facts when we get our records. We want to save time.

MR. SIMONS:

If Your Honor please, there has been no proofs at all as to what this association is, their purposes or aims, or what the nature of these payments was, except a statement by Mr. Hirsch, which is not evidence.

MR. HIRSCH:

I agree with that.

MR. SIMONS:

I ask Your Honor to cross out this entire item.

THE COURT:

Well, I think assessments or dues, or what-

ever it is, of a hosiery association are proper recurring charges and can be apportioned.

MR. SIMONS:

Well, there is no evidence as to what they are or that they are dues.

MR. HIRSCH:

Technically speaking, Mr. Simons is right, I can't testify, so that if you want you can strike the whole item, with leave to me to produce testimony.

THE COURT:

All right. What is the whole item?

MR. HIRSCH:

\$1,743.03; and we will produce testimony on that, on that point.

MR. SIMONS:

Dues and subscriptions.

MR. HIRSCH:

All right, that will save time.

BY MR. SIMONS:

Q. You have an item of \$728.53 for general expense. What is that supposed to be? What is the total of your general expense for the entire year?

A. I have \$3,190.18.

Q. \$3,190.

A. .18.

Q. Where is that?

A. It is made up of these items (indicating), welfare, \$215., miscellaneous auto repairs, \$423.92, pay-roll delivery, \$351.75, miscellaneous wages, \$356.13.

Q. And a miscellaneous account of \$1,858.38, which is what?

A. Why,—

Q. Now, let me ask you this, the figures on this statement, this typewritten statement, for 1937, are not exactly in accord with your working sheets, is that correct?

A. Yes, but this—this may have been adjusted.

Q. Adjusted, you mean with other items here?

A. That is right.

Q. Your general expense adjusted with other items?

A. Fifteen dollars, in that particular case.

Q. Now, this particular item that you are charging, \$728.53, for the period of May 6th to August 19th, consists of a miscellaneous expense of—

A. Eighteen hundred—

Q. —\$1,858.38?

A. For the entire year.

Q. You don't know what that is about?

A. Not offhand. We could get the supporting data, but we don't have the information here.

MR. HIRSCH:

I will withdraw it until I prove it.

MR. SIMONS:

Withdraw the whole item?

MR. HIRSCH:

Yes, until I prove it.

MR. SIMONS:

All right.

MR. HIRSCH: .

No use in taking time now, if we don't have it here.

THE COURT:

How much is it?

MR. SIMONS:

\$728.53.

MR. HIRSCH:

\$728.53, as long as we don't have the data.

BY MR. HIRSCH:

Q. Is that right, the data isn't here?

A. That is right, the data isn't here.

MR. HIRSCH:

We will try to get it.

BY MR. SIMONS:

Q. Pennsylvania capital stock tax, \$2,720.60?

A. Yes, sir.

Q. Now, suppose you explain to us what the Pennsylvania capital stock tax is.

A. Pennsylvania capital stock tax is an eight mill tax—

Q. On what?

A. On the declared value or the actual value of the assets of the company at the end of each particular year.

Q. In other words, you have a right, or you had a right several years ago to declare the value of your stock?

A. No, sir, you are referring now to Federal capital stock tax.

Q. Oh, this is the Pennsylvania capital stock tax; all right, go ahead.

A. You are still referring to the Pennsylvania?

Q. Yes, that is the Pennsylvania, I am sorry. I was referring to the Federal.

A. The Pennsylvania capital stock tax is the value established by the State Department.

Q. And that is on your capital stock, and that is a matter—

A. Based on—

Q. On the value?

A. No, sir, it is based on the actual value of the assets.

Q. Actual value of assets?

A. Yes, sir.

Q. It has nothing to do with profits or losses?

A. Only indirectly. The profit or loss may be used as a factor in determining the actual value for tax purposes.

Q. But when they considered the value they asked you to give them the book value and the actual value of the assets?

A. And they also ask you to give them any income that you may have had for the past five-year period.

Q. But the return is on assets?

A. The return is based on assets.

Q. In other words, you have the building, your cash, inventories, and other assets?

A. That is correct.

Q. Now, how did you arrive at that figure of \$2,720.60?

A. The total for the year was nine thousand—the total for the year is estimated at \$9,446.52.

Q. Let me see that in your books here.

BY MR. HIRSCH:

Q. How much is it?

A. \$9,446.52.

Q. Total tax for the year.

MR. HIRSCH:

This sheet that I am looking at is our sheet, isn't it?

MR. SIMONS:

Yes.

MR. HIRSCH:

I didn't want the jury to think I am looking at your papers.

MR. SIMONS:

You are perfectly at liberty to look at my papers.

MR. HIRSCH:

That is the one Mr. Ladenheim gave to me.

(Discussion off the record.) °

THE WITNESS.

Let me look at my trial balance, to see where it is.

BY MR. SIMONS:

Q. Well, now, you have it here as a reserve for estimated Pennsylvania capital stock tax?

A. That is correct.

Q. In other words, you estimated what the tax would be?

A. Yes, sir.

Q. And can you tell me what the tax actually was?

A: It was very close to that figure, I can't recall offhand, but we can get the return down showing the actual return.

Q. Well, let's see it on your books. You have it on your books here?

A. Yes, it is on the books.

MR. SIMONS:

May I at this time ask Your Honor's thought in this matter? This is a tax that is purely on assets, has nothing to do with profits or losses, it has to be paid regardless of what the operations of the business would show, with the exception as to whether or not profit is added to surplus, and the increase in value of any particular assets, or whether there is a change in inventory value.

THE COURT:

Well, I think it is a proper item.

MR. SIMONS:

You think it is a proper item?

THE COURT:

I will overrule the objection; yes.

MR. SIMONS:

I say, that has to be paid regardless—

THE COURT:

I know.

MR. SIMONS:

—of what happens.

THE COURT:

Surely.

MR. SIMONS:

That is why I don't think it is a proper item or charge.

MR. HIRSCH:

All the more reason why it is a charge.

(Discussion off the record.)

BY MR. SIMONS:

Q. You have an account here, reserve for Federal and Pennsylvania taxes. As you set up your account on your statement as reserve for estimated Pennsylvania capital stock tax of \$9,446.52, that would be set up as a credit in the account, in the reserve account, and charged through as an expense for the operations of the year.

A. That is correct.

Q. Now, there is no such charge on this particular account of reserve for Federal and Pennsylvania taxes, is there?

A. I can't locate it offhand, but there must be a corresponding entry.

MR. HIRSCH:

Just take your time.

BY MR. SIMONS:

Q. Now, this is paid when to the Pennsylvania—

A. It is paid March 31st of each year.

Q. 31st, or the 15th?

A. 15th.

Q. It is due the same time—

A. The same.

Q. —as the Federal taxes are due?

A. That is correct.

Q. Now, in 1938—

MR. HIRSCH:

Let him find this, now.

MR. SIMONS:

Well, maybe I can straighten this out. I can read this.

BY MR. SIMONS:

Q. On March 31, 1938 you have a payment to the Pennsylvania C. S. T., which may be your capital stock tax, of \$4,451.45?

A. What date is that?

Q. March 31, 1938.

A. This—'38.

Q. That would be for '37 capital stock tax,—

A. No.

Q. —wouldn't it?

A. That is when they changed from a fiscal to a calendar year basis for Pennsylvania capital stock tax purposes, and they had to pay one-half year in there, which was about half of the nine thousand dollars. In other words, they filed a return for one-half year.

Q. Well, see if you can find that entry to show that entry on these books here.

Let me ask you this, would this have been paid through your cash book?

A. It should be paid through the cash book.

Q. Now, if we look at March 15, 1938 would that give us the figure.

(Discussion off the record.)

MR. SIMONS:

Will you note that the cash book, page 479, shows a payment on March 10, 1938, Department of Revenue, Pennsylvania capital stock tax, of \$4,451.45.

BY MR. SIMONS:

Q. Now, March 31st, is there any payment?

BY MR. HIRSCH:

Q. Is there another payment on March 31st?

A. No. Look in July.

BY MR. SIMONS:

Q. July of when, '37?

A. '37.

Q. July, '37.

THE WITNESS:

Mr. Hirsch, I think we can support that if we can look it up tonight, because there was some trouble about the Pennsylvania capital stock tax.

BY MR. HIRSCH:

Q. What figures do you need? You have a figure here.

A. Yes, but that is not the figure we are claiming in this account. I believe what we have set up as the nine thousand dollars is correct.

Q. You mean \$9,446.52 is correct?

A. Whatever that figure is for the year is correct, yes, sir.

Q. That is the actual payment made?

A. I believe it is.

BY MR. SIMONS:

Q. Well, there is no record of it in your books, in your cash book?

A. Well, I would have to refresh my memory, look it up.

THE COURT:

How much is it?

MR. SIMONS:

\$2,720.60.

MR. HIRSCH:

I would like to withhold that until we can—

THE WITNESS:

We can support it.

MR. HIRSCH:

The witness can look it up overnight. —

THE WITNESS:

We can support it.

THE COURT:

All right.

BY MR. SIMONS:

Q. Now, how about your Federal capital stock tax of 432, \$432.?

A. That was fifteen hundred dollars for the total year.

Q. Well, now, let's see. Where is it?

BY MR. HIRSCH:

Q. That is proportioned?

A. That is proportioned, yes, sir. That is July 31st.

(Discussion off the record.)

THE WITNESS:

That was the year when—I might add originally we had fifteen hundred dollars set up on the Federal capital stock tax and then, of

course, in 1937, the profits—there was no permission given or granted to re-value on the Federal capital stock, so with the profits that adjustment was made, I think it was two thousand dollars we originally set up, and then we had a loss applied in there and brought it down to that figure.

BY MR. SIMONS:

Q. Well, now, that original figure of fifteen hundred dollars is a figure that was arbitrarily set by you in order to establish the value of the capital stock?

A. That is correct.

Q. In other words, you said that your capital stock was worth what, one hundred and fifty thousand dollars—or, one million, five hundred thousand dollars?

A. I think it was around million that was used on that basis.

Q. Well, if you set fifteen hundred dollars that you paid, that was because you yourself said that your capital stock was worth a million, five hundred thousand dollars?

A. Who do you mean when you say "you"?

Q. Well, you on behalf—you for the company.

A. No, sir, the company set that value.

Q. Oh, the company set that value, and that is the report that you filed?

A. Yes, sir.

Q. That was an arbitrary value put on by themselves because of the fact that you were allowed a certain percentage of profit on a million, five hundred thousand dollars, and if you went above that

percentage you then had to pay an excess profits tax?

A. That is correct.

Q. And that is the reason you set that figure?

A. I don't say that is the reason it was set. That is the value that the officers of the company set upon the value of the capital stock for that purpose.

Q. And that is purely a matter of tax strategy, I might say.

MR. HIRSCH:

Now, I object to that remark for the reason—

MR. SIMONS:

Oh, no, it has nothing—

MR. HIRSCH:

Let me finish my objection.

MR. SIMONS:

Before you finish the objection may I say it is not a question of imputing anything improper to anyone.

MR. HIRSCH:

It is allowable by law.

MR. SIMONS:

The Federal Government say you may do that.

MR. HIRSCH:

All right.

MR. SIMONS:

When I say "strategy", I say a matter of tax expediency, if that is a better word.

MR. HIRSCH:

And allowable by law.

MR. SIMONS:

Yes.

MR. HIRSCH:

All right.

MR. SIMONS:

What I am getting to is, it is not a matter of expense that I think can be chargeable here. It is a question of an arbitrary figure set up merely for the purpose of possibly saving tax on profits in the future, if there are profits.

MR. HIRSCH:

Well, if Your Honor please,—

MR. SIMONS:

Which the Federal Government permits them to do.

MR. HIRSCH:

If Your Honor please, I don't know whether you are familiar with this particular tax. If I recall, it came under the Agricultural Amehdment Act—

THE COURT:

I know all about it. If there is an objection I will overrule the objection.

BY MR. SIMONS:

Q. That item was \$1,732, that is the payment to the Federal Government, and you charged \$432—

MR. SIMONS:

Your Honor is overruling my objection on that—

THE COURT:

Yes.

MR. SIMONS:

—particular item of expense?

THE COURT:

Yes.

BY MR. SIMONS:

Q. Incidentally, will you get your figures ready on the Social Security taxes that you have charged for \$1,897.23? Show me how you computed that.

A. The Social Security taxes, represented an amount of—this is for the year, now—

Q. Yes.

A. —\$43,057.80.

Q. Now, when you say—

A. Which is the unemployment compensation, the company's share, and O. A. B. taxes, the old age benefits, \$20,672.91. Those taxes are computed by the employees of the company. We don't go into the detailed items. We have no make-up of that, we accept their figures as being correct, and the item which we have charged against this particular period is predicated upon the total wages in that period, I think on the rate—whatever the prevailing rate was at the time, three per cent.

BY MR. HIRSCH:

Q. But it was only on the wages you paid during that period?

A. During that period.

Q. Not proportioned on the whole year?

A. No, sir, only on the wages paid during that period.

MR. SIMONS:

If Your Honor please, it is understood we haven't checked on the pay-rolls, but I am just taking them as they are given here.

THE COURT:

Yes.

BY MR. SIMONS:

Q. Do you have the figures there chargeable during this period?

A. Yes—you mean the wages?

Q. Yes.

A. Yes.

Q. All right, suppose you check this with me. Go ahead, what figures do you have?

A. Superintendence, six thousand dollars. Factory supervision—

Q. Now, just get these figures down. Jot them down.

A. Yes.

Q. Now, superintendence, you don't charge six thousand dollars?

A. No, it would only be up to one per cent on three thousand.

Q. And that—

A. And the other two per cent on the full six thousand. Want to split it?

Q. Now, wait a second, on the basis of the year—this is Mr. Struve's salary, is that right?

A. That is right.

Q. On the basis of a year how do you pay that Social Security?

A. That is paid monthly, I mean, on the basis—

Q. I understand.

A. —up to three thousand dollars. Then it discontinues after three thousand has been reached, with respect to the O. A. B.

Q. Three thousand dollars for what period?

A. Well, in Mr. Struve's case it would be whatever time it reached, up to the time where the total amount of three thousand dollars would be paid.

Q. Well, now, if he gets four hundred dollars a week, after eight weeks you don't charge any more—

A. That is correct.

Q. —Social Security?

A. That is correct.

Q. So, therefore, there is no charge on that six thousand at all?

A. All right.

Q. So we will deduct the six thousand dollars.

MR. HIRSCH:

No.

THE WITNESS:

No, that is only for the O. A. B.

MR. HIRSCH:

Let me get a ruling on this. If Your Honor please, I don't think it matters when the salary amount has come to a point where the tax stops.

THE COURT:

Oh, I don't, either. I don't think it makes a particle of difference.

MR. HIRSCH:

In other words, there is a salary for the year.

THE COURT:

That is right.

MR. HIRSCH:

There is a certain tax to be paid, and it is allocated.

THE COURT:

That is right.

MR. SIMONS:

If Your Honor please, you are not going to charge tax only for this particular period when he is paid all year?

THE COURT:

Mr. Hirsch is perfectly correct. It is an annual tax paid on a yearly salary.

BY MR. SIMONS:

Q. Well, set aside that three thousand dollars into one item, as to what payment is made to him. Keep that separate from the other figures, and then we will compute that proportionately.

Now, what is your next one?

A. Factory supervision, eighteen thousand.

Q. Do you have a list of the employees in your factory supervision?

A. Yes.

Q. Where is that list? Is this it (indicating)?

A. Yes.

MICRO CARD

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BY MR. HIRSCH:

Q. What was that figure, eighteen thousand?

A. Eighteen thousand—

BY MR. SIMONS:

Q. Now, wait, before you get to that figure, it is \$3,264. that you are charging us here?

A. Yes, that is true, but we had to pay the Social Security taxes on the total wages paid.

Q. Well, we are going to figure out, we are going to figure out, if possible, the actual amount that you are charging here and what we are supposed to be charged with, and see if your figure is correct. Now, you are charging us here with \$3,264.25.

A. Yes, but—

Q. Now, how many—is that the amount chargeable for the period of May 6th to August 19th?

A. Yes, but that was based upon the total eighteen thousand dollars, because we had to spend that money, because those people worked on repairing damaged machinery.

Q. You are charging here in this particular item \$3,264.25. Now, we haven't explained that item yet or computed it, but that goes in to make up your total?

A. That is correct.

Q. That is correct, so, therefore, we are only concerned with thirty-two hundred dollars in this discussion.

MR. HIRSCH:

Just a second, if you please. When you say "You are charging us with thirty-two hundred", you mean that in the sum total, which

when proportioned to this period totaled \$1,897.23, there was originally charged this other, larger sum.

MR. SIMONS:

Mr. Hirsch,—

MR. HIRSCH:

We are only asking \$1,897.23.

MR. SIMONS:

—he read into the testimony—oh, I am not talking about the Social Security. I am talking about the factory supervision you have here for \$3,264.25. This is the figure that we are being charged with.

MR. HIRSCH:

Oh, well, I thought you were talking about the tax. Go ahead.

MR. SIMONS:

No, no, we will come to the tax after that.

BY MR. SIMONS:

Q. Now, can you give me the names of your employees, or the factory supervision? Do you know that?

A. Yes.

Q. Who are they?

A. Start with Hoch, down, from here, down (indicating).

Q. Now, Hock gets one hundred and seventy-five dollars a week, is that correct?

A. That is correct.

Q. Therefore, he comes above the three thousand dollar a year charge. Ludwig gets one hun-

dred dollars a week. Therefore, he comes beyond the three thousand dollars.

Herbert Ludwig, seventy dollars a week, also comes beyond the three thousand dollars.

Who is your next one, Leon Powell?

A. Whatever they follow there.

MR. HIRSCH:

If Your Honor please, I am going to interpose an objection, which I am doing for the purpose of saving time, and for the reason I think it is proper. If this witness testifies—and if he has not, I will ask him the question—that what we are asking reimbursement for represents a proportion of the exact sum that we actually paid out on these persons for Social Security and Old Age—

THE WITNESS:

Old Age benefits.

MR. HIRSCH:

Old Age benefits—then I don't think that the details that are being inquired into matter at all. In other words, here we are only asking to be reimbursed the proportionate share of the money we actually expended. The fact that one man's salary came up to three, and then from then on there was no Social Security tax, in other words, is absolutely irrelevant. If Mr. Simons wants to show we are asking for something we never laid out, I think he has a right to do that.

THE COURT:

No, all he can show is you may be asking for

a few dollars that you paid in excess of what you possibly had to pay. That is all I can see to it.

MR. SIMONS:

I think that is about twice the amount that should be chargeable with. I mean, I am doing that merely from a glance at the figures we have here.

THE COURT:

Why do you think that?

MR. SIMONS:

Because of the fact they have charged up an amount of money proportioned upon the total amount paid.

THE COURT:

I think they have a right to do that.

MR. SIMONS:

Yes, but they are charging us with specific items of labor during that period of time, and if we are chargeable with the tax we are chargeable with the tax on that particular labor.

THE COURT:

I think you are chargeable with the proportionate share of the total Security Tax paid during the year.

MR. SYME:

Well, how, Your Honor,—

THE COURT:

Well, gentlemen, what is the use of arguing? That is what I think. Now, I still think so, and I will think so—

MR. SYME:

Well, Your Honor, the Social Security tax is a tax—

THE COURT:

Don't argue.

MR. SYME:

—on pay-roll,—

THE COURT:

I didn't—

MR. SYME:

—and if we are charged, we can't be charged with a proportion of the pay-roll, we can only be charged with a proportion of those who actually worked.

MR. HIRSCH:

That is what he said.

MR. SYME:

The supervisory people, on the supervisory people we can pay only on the basis of the tax on their salaries.

MR. HIRSCH:

That is what he said.

MR. SYME:

And, therefore, the amount they get becomes pertinent.

THE COURT:

You go ahead and examine as fully as you want.

MR. HIRSCH:

Wait a minute, just a second, I may have

made a mistake. The tax is based on what was actually paid during that period.

MR. SIMONS:

No, it is not. No, it is not. That is the objection.

MR. HIRSCH:

Now, wait a minute.

BY MR. HIRSCH:

Q. Tell us how the tax is computed, and maybe we will all be straight.

A. The salary is based upon, as far as I can recollect at this late date, of course, that was done two years ago, but the best of my recollection is that it was based on the actual salaries and wages paid during that period, irrespective of what work was done, whether it was on repair work or whether it was on—whether they were home; as long as the salary was paid it was computed on that basis for those salaries and wages during that period from May 6th to August 19th, irrespective of what they did.

BY THE COURT:

Q. How often do you pay the Security tax?

A. Well, that is paid quarterly.

Q. Yes.

A. That is payable quarterly.

THE COURT:

Well, all right. Now, that is what he says. Go ahead, Mr. Simons.

BY MR. SIMONS:

Q. Now, all of your factory supervisors are

above the three thousand dollar a year amount in salaries?

A. Yes, sir.

Q. All right. Therefore, will you put down \$3,264.25? Now, you have the three thousand down for—

A. What is your figure?

Q. \$3,264.25. Now, indirect labor. Do you know whether or not they are over, above—

A. I would say they are all below, because they are mostly maintenance men.

Q. All below. Now, will you put that figure on a separate column, then, so we can get the full tax on that figure?

A. Well, you are going to get the full tax on these, too.

Q. I am dividing it now into those above three thousand and those below three thousand.

A. O. K.

Q. So we can compute our tax simpler.

A. \$5,098.82.

Q. \$5,098.82?

A. \$5,098.82.

Q. Right.

MR. HIRSCH:

Will you pardon me just a minute? Mr. Lardenheim has a theory, and if Mr. Langer will sit down, if the two of them get together, if he is right,—

MR. SIMONS:

Perfectly all right, go ahead.

MR. HIRSCH:

Work it out with him, will you? We may

save a lot of time here. See what Mr. Ladenheim says about it.

THE COURT:

Are you pretty nearly through with this?

MR. HIRSCH:

This is the last item.

MR. SIMONS:

This is the last item. Of course, Your Honor, we haven't gone into the question of any of the labor items that have been left open.

MR. HIRSCH:

What labor items?

MR. SIMONS:

All of them. You didn't have the pay-roll here this morning.

MR. HIRSCH:

Oh, all right.

(Discussion off the record.)

MR. HIRSCH:

All right, if Your Honor please, I think we have saved a lot of time. Now, the accountants have gotten together. We worked out a re-alignment of this figure. Instead of claiming \$1,897.23, we claim \$930., a difference of \$967.23 being disallowed. What is that item called, Social Security?

THE COURT:

All right, \$967 of that item is stricken out. All right.

MR. HIRSCH:

\$967.23. All right, that finishes that.

THE COURT:

Well, is there anything further? I guess we might as well stop; it is quarter of five. All right, we can adjourn.

Adjourned until Thursday, March 30, 1939,
at ten o'clock A. M.

Philadelphia, Pa., March 30, 1939

Ninth Day

Plaintiff's Evidence (Continued)

THE COURT:

I think we are ready to proceed, gentlemen.

JOSEPH C. LANGER, recalled.

Cross Examination (Continued)

MR. HIRSCH:

We are trying to go over one item here.

THE COURT:

All right.

MR. HIRSCH:

That I think will save some time.

THE COURT:

All right.

MR. HIRSCH:

It won't be but a minute.

THE COURT:

All right.

MR. SIMONS:

If Your Honor please, in the matter of some of these items of salary, as I have said before, these are all going in over my objection, I don't believe that they are proper charges, in view of the fact that you have ruled that they may be admitted into evidence for consideration by the jury. I say on the question of superintendence, of six thousand dollars, the books undoubtedly indicate that that was paid and is the salary paid to Mr. Struve as superintendent, his complete and entire salary for that period of time.

THE COURT:

Yes.

MR. SIMONS:

I enter my objection to that as being a proper item of charge, a proper item to be admitted into evidence for the consideration of the jury.

THE COURT:

Well, I will overrule the objection.

MR. SIMONS:

There is an item of factory supervision of \$3,264.25, and in order to save the time of Your Honor and the members of the jury, I have

checked the figures on that, and that money has been paid by them.

THE COURT:

Yes.

MR. SIMONS:

I also object to that as a proper item for admission into evidence, and I assume—

THE COURT:

I make the same ruling.

MR. SIMONS:

Same ruling.

THE COURT:

Yes.

MR. SIMONS:

There is also the item of Mr. Meyer's salary of \$10,125. My thought there is exactly the same.

THE COURT:

Same situation.

MR. SIMONS:

Same situation.

THE COURT:

Same objection and same ruling.

MR. SIMONS:

That is right. There is one other item of indirect labor of \$5,098.82 that I have not been able to check or been able to satisfy myself that that has been paid for that period of time and is chargeable to or is a matter that should

be admitted into evidence as possibly chargeable to the defendants.

MR. HIRSCH:

You are going to question him on that item now,—

MR. SIMONS:

Yes, if you—

MR. HIRSCH:

—or I will question further on it.

MR. SIMONS:

Well, I will question him.

MR. HIRSCH:

Go ahead.

BY MR. SIMONS:

Q. Now, you have a charge here of \$5,098.82 as indirect labor. Will you explain just what that means?

A. That represents the wages of watchmen and maintenance men during that period of time who are not—who are not employed in doing any repairs to the plant or equipment.

Q. Do you have a schedule of that?

A. The schedule, we have it prepared here, but the details would be in the pay-roll records, we would have to support it by that.

Q. Well, how can you support that figure? That is what I want to know.

A. We can support it by the pay-roll records.

Q. Well, will you get the pay-roll records and see if you can support that figure?

MR. HIRSCH:

Where are your records of pay-roll?

BY MR. SIMONS:

Q. Is there any account that you carry on your books known as indirect labor?

A. No, sir.

Q. There is no allocation at any time of indirect labor?

A. No, sir.

Q. In your pay-roll account you do have an account for watchmen?

A. Not an account, but all wages are charged to an account termed "Wages".

Q. Well, will you show us how that five thousand dollars is made up? You have no—let me get this straight—you have no supporting schedule for it?

A. No supporting schedule.

Q. How did you arrive at this figure of five thousand dollars from the papers that you have? You have all your work sheets here?

A. Yes, sir. That represents the actual wages paid during that period of time.

Q. Well, how did you arrive at it?

A. By the actual pay-roll periods.

Q. Well, now,—

A. Actual amounts paid during that period of time.

Q. All right, refer to your work sheets and let me see how you arrived at a figure of five thousand dollars.

MR. HIRSCH:

In other words, what did you do, is that right, you mean, to arrive at that figure?

MR. SIMONS:

That is right.

BY MR. SIMONS:

Q. What did you do? What did you look at?

A. Actual pay-roll sheets.

MR. SIMONS:

Wait a second, I am asking him to look at his work sheets,—

MR. HIRSCH: .

All right.

MR. SIMONS:

—and from his work sheets to let me know how he got the figure of \$5,098.82.

BY MR. HIRSCH:

Q. What are you looking for, that sheet you had before?

A. Yes, the one I was looking at with Mr. Simons a minute ago. Here it is.

Q. Got it?

A. Yes.

BY MR. SIMONS:

Q. Now, wait a second. First of all, this is a summary of salaries and wages as of December 20th, period of examination December 31, 1937?

A. That is correct.

Q. That is correct. Now, you have marked down

here "direct" "indirect", factory supervision, shipping, and all the other items?

A. Yes, sir.

Q. Now, you have maintenance, under "indirect", maintenance, machinist, nurse. Now, how did you arrive at the five thousand dollars from that?

A. We took the whole—first of all, we started out with one hundred and twenty thousand, which is this amount here, after elimination of items of wages, maintenance men, paid in connection with repairing of damages to the plant and equipment. That left one hundred thousand dollars—\$120,170.94—for the year. Then that amount—

Q. Now, wait a second. You have a total here of \$104,195.82?

A. Yes, that is correct.

Q. Yes.

A. Yes.

Q. And then you added to that \$15,975.12?

A. That is correct, that is right.

Q. Now, let me see your statement. Oh, how did you get this figure of \$15,975.12? What does this \$14,520.12 refer to?

A. That refers to the salaries and wages paid with employees used in connection with repairing the plant and equipment.

Q. Therefore, that is not an item for consideration here?

A. We have eliminated that item.

Q. And then the only other balance is 1455?

A. That is right. We have eliminated, may I have that schedule, please? In this \$15,358.85—

Q. No, that is factory supervision. We are talk-

ing about indirect labor, now. That is \$15,975. What is this figure?

A. This fifteen thousand here is part of this figure (indicating).

Q. In other words, you have allocated \$15,975.12 as an item for indirect labor, or is that just for machinist? Which is it?

A. Under this whole group.

Q. Under this whole group, and that includes the nurse, the machinist, and the maintenance?

A. Yes, sir.

Q. Now, how did you, from this fifteen thousand dollar figure, how did you arrive at this five thousand dollar figure?

A. By—

Q. I know you subtracted, you subtracted ten thousand from the fifteen to get the five?

A. That is correct.

Q. Why did you subtract ten, and why is this five?

A. Because this ten thousand dollars—

Q. I want the supporting data.

MR. HIRSCH:

Let him answer, Mr. Simons. You keep asking questions and answering. Let him answer himself.

MR. SIMONS:

Listen, if we happen to think faster, I am sorry. He understands—

MR. HIRSCH:

I can't think any faster than the jury can hear. I want the answer.

MR. SIMONS:

The important thing is the explanation, and not the figures themselves.

MR. HIRSCH:

I object to the witness being asked a question and Mr. Simons immediately answering it for him.

THE COURT:

Yes.

MR. HIRSCH:

Now, ask the question and let him answer.

THE COURT:

You ask the questions, Mr. Simons.

BY MR. SIMONS:

Q. You have fifteen thousand. You have subtracted ten thousand from that, and there is five thousand balance which you claim is chargeable to this particular period?

A. Yes, sir.

Q. Now, will you show me how you arrived at that figure?

A. Which figure?

Q. That five thousand dollar figure.

A. I stated here, we have the total charge in here of \$15,975.12, which is shown here as chargeable against this period, and we have eliminated from that amount the amount of \$10,876.30, which represents wages paid to people who were used in connection with repairing the plant and equipment.

Q. Where are the schedules for that?

A. The schedules are here. You had them when

you examined it for the other charges that we made.

Q. You mean you didn't make up any list of the pay-roll that is applicable to this particular period?

A. No, sir, nothing else—

Q. And without making up a list or without making up a schedule you arrived at this figure of ten thousand dollars?

A. No, sir, that was made up figuring on the total wages paid for that period of time.

Q. Where are the papers from which you made it up? You didn't put down ten thousand dollars and throw away your working sheets. You must have had your working sheets somewhere to compute that figure.

Mr. Langer, let me ask, didn't you make an analysis of the pay-roll?

A. Yes.

Q. Is that what you want to explain?

A. We made an analysis.

Q. Now, do you have that analysis anywhere, of that pay-roll? You see what we are after.

A. Yes, well, if I may, Mr. Hirsch, can I speak to you a minute? The thing is, if I may be permitted to check it, I can find the item and give you the amount that is shown.

Q. Certainly.

A. That is, the deduction, but I can't give it to you offhand.

MR. HIRSCH:

You do anything that you have to do to get the information. Now, you go ahead and do it.

THE WITNESS:

It will take some time to get the information.

MR. SIMONS:

It is perfectly all right.

BY MR. HIRSCH:

Q. You mean you have to check back?

A. Yes.

BY MR. SIMONS:

Q. Let me ask you this, you would have to go through the pay-roll sheets now?

A. That is right.

Q. And make up the deduction of that ten thousand dollars?

A. Yes, sir.

Q. In order, to show us how you arrived at it?

A. Yes, sir, and that would take some time to do that.

Q. Now, do you have any of the papers that you used in originally making up that deduction, when you made up the figures that you have there now?

A. I can't locate them here right now, but they were made up, and we have a schedule somewhere.

BY MR. HIRSCH:

Q. What was the sheet you had this morning?

A. That was on the salaries.

BY MR. SIMONS:

Q. That was an analysis of the complete salary account for the year?

A. Yes.

Q. And gave merely the totals?

A. Yes.

Q. It had no details or any breakdown?

A. We can support this figure, if I may be permitted the time to do it.

BY MR. HIRSCH:

Q. Let me ask a question. You have a total figure of some fifteen thousand dollars. That represents actual wages during this specific period for both repair purposes and non-repair purposes?

A. That is correct.

Q. Then you analyzed the pay-roll sheets to determine who was working on repairs, and eliminated that from the fifteen thousand?

A. I did.

Q. That, in round figures, was ten thousands?

A. Yes, sir.

Q. And the remaining five thousand was for indirect labor, which was not on repairs?

A. That is right.

BY MR. SIMONS:

Q. Now, wait, as a matter of fact, what you have there is this, you have a figure for the entire year of 1937?

A. That is correct.

Q. And after you have that whole figure for the year, you also have a figure showing what you claim is allocated, that fourteen thousand, five hundred, and fifteen hundred dollars?

A. That is right.

Q. Those two items?

A. That is right.

Q. Which you have added?

A. That is right.

Q. And then from those two items you have subtracted another figure?

A. Of ten thousand.

Q. Therefore, this has been an analysis of your pay-roll for the whole year?

A. And for that specific period.

Q. And then you brought it down to that specific period?

A. That is correct.

Q. We are still interested in knowing how you arrived at that specific figure.

A. You can arrive at it, but it would take some time to dig it out.

Q. Can you do it now?

THE COURT:

Oh, we can't suspend the trial to have that done.

BY MR. SIMONS:

Q. How long would it take to do it, do you know, Mr. Langer?

THE COURT:

He says he can do it.

BY MR. SIMONS:

Q. What?

A. I would say maybe an hour or so.

MR. SIMONS:

Would Your Honor want to pass that matter, then, and let Mr. Langer do it later on?

THE COURT:

Well, if you think it is worth while, yes.

MR. SIMONS:

Well, of course, personally I don't—I am going to object to it, it is to my advantage

not to do it. I would object to the item at the present time without any supporting data, unless Mr. Hirsch feels that he doesn't want to take the time to do it.

MR. HIRSCH:

Well, I won't waive that item. That is an item of actual expense. That is actual wages expended during that period.

BY MR. HIRSCH:

Q. Is that correct?

A. That is correct.

Q. You spoke of allocation. Is that a proportional allocation?

A. No, that was actual wages paid at that time.

Q. When you spoke of the total wages for the whole year, what has that got to do with this period from the standpoint of actual expenditures?

A. None.

Q. That is right.

MR. HIRSCH:

Well, I am willing that this witness when he is through on all other points, while we are examining other witnesses, should make this—

THE COURT:

Yes, better do it that way.

MR. HIRSCH:

—exploration for Mr. Simons; and we will support it. I won't waive any of it.

THE COURT:

Better do it that way.

MR. HIRSCH:

We will continue with something else.

BY MR. HIRSCH:

Q. You will do that when you are through?

A. I will do it, yes, sir.

MR. HIRSCH:

I have some other items to ask him about to pick up from yesterday.

THE COURT:

Well, I don't know whether the cross examination is through yet.

MR. SIMONS:

I think that is the only other item we have, if Your Honor please.

MR. HIRSCH:

Now, we are talking about these items, now.

MR. SIMONS:

When you complete these items I am not through with the cross examination, because we have the other phase of the examination, as to the profit and loss statement of the business, but as to these items, so the record will show some degree of continuity,—

THE COURT:

All right.

MR. SIMONS:

—Mr. Hirsch wants to follow it with some other things he has.

THE COURT:

Very well.

Direct Examination. (Continued)

BY MR. HIRSCH:

Q. You were asked yesterday on an item of boarding forms, boarding form rentals, for which a claim is made of \$1,913.52. Have you since yesterday gotten out the invoices and the actual payments for those rentals?

A. I have.

Q. Will you produce them? And what do they total, what were our actual payments?

A. Actual payments, \$2,288.80.

Q. For this period I am talking of.

A. For that period.

Q. And we are claiming \$1,913.52?

A. Yes, sir.

THE COURT:

Well, we want the original leases, also.

MR. HIRSCH:

Yes, we have those here.

BY MR. HIRSCH:

Q. What does the difference represent, error on our part, or explain the difference between what we are claiming and what the invoices show.

A. No, after allocating for the month of May and the month of August.

Q. Oh, I see.

A. Because it actually works out to \$1,956.58, and we only claim \$1,913.

Q. In other words, the rentals you spoke of totalling twenty-two hundred were for the total months of June, July and August?

A. Complete months.

Q. When you allocate it, it comes to \$1,956.58?

A. That is correct.

Q. We have only asked \$1,913.52?

A. That is correct.

Q. You have all the invoices there?

A. Yes, sir.

Q. And they were all paid, based on your audit of the cash accounts of the business?

A. They were.

Q. Now, will you produce the leases, please, for those? And were those invoices in accordance with the amounts called for in the lease?

A. I presume so.

Q. What do they amount to per month?

A. The amounts are there. I don't have the invoices.

MR. HIRSCH:

Here is the lease.

(The lease was produced for counsel.)

BY MR. HIRSCH:

Q. Do you know whether or not any rebates—I have been asked to ask you whether any rebates were given to the company for using so many forms, or was this the actual payments you made, without any returns?

A. They were the actual payments.

MR. SIMONS:

Do you want me to cross examine on each item as you are through with it?

THE COURT:

Yes, I think it would probably be a good idea.

MR. HIRSCH:

Go ahead.

Cross Examination (Continued)

BY MR. SIMONS:

Q. Now, the only lease on any boarding forms which you have is with the Paramount Textile Machine Company?

A. I presume so.

Q. Suppose you look it over. This is the lease which you had with them that sets forth the rate of twenty-five cents for a form, thirty-five cents for a stainless form, is that correct?

A. Yes, sir.

Q. Now, the bills that you presented to me are all the bills that you had in the file, going from the beginning to the end?

A. That is correct.

Q. Now, of course, we are not interested in the bills for January, February, March and April, is that right?

A. That is right.

Q. Now, this particular lease has nothing to do with the Universal Dye Works?

A. No, sir.

Q. No, sir, so, therefore, this has nothing to do with it, is that correct? Look at this bill (indicating)?

A. That is right.

Q. And we also have nothing to do with the Barsol Hosiery Finishers?

A. No, sir.

Q. This is a bill of October, so we are not concerned with that; this is December, November and December.

Now, you have a bill here of May 29th—do you want to jot these down and get these figures?—\$572.20, and June is \$572.20, July, \$572.20. How did you allocate August?

A. On nineteen thirty-firsts. There was nineteen days.

BY MR. HIRSCH:

Q. And May the same?

A. Yes, sir.

(Discussion off the record.)

MR. SIMONS:

I think that takes care of this, then.

MR. HIRSCH:

Are these figures correct, or what?

MR. SIMONS:

Yes, they are correct. I wanted to make sure as to the other forms.

If Your Honor please, just not to hold it up, the only question is as to whether or not that lease has any statement in it as to use or non-use, and we will check through it. If there is anything there we will take that up a little later.

MR. HIRSCH:

We will go through it. Otherwise the item is correct?

MR. SIMONS:

The figures are correct, yes, sir.

MR. HIRSCH:

That was an item Your Honor excluded until I could prove it.

THE COURT:

I know.

MR. HIRSCH:

That is \$1,913.52.

THE COURT:

I will not allow the item, and entertain a motion to strike it out if it appears to counsel that the lease releases payments during non-use.

MR. HIRSCH:

That is satisfactory, sir.

MR. SIMONS:

Of course, Your Honor, the objection you have noted at the beginning of the testimony goes along for this, too.

Direct Examination (Continued)

BY MR. HIRSCH:

Q. Now, you had an item yesterday which was temporarily excluded of shipping wages, \$525. Do you have any specific information that enables us now to support that?

A. That item is included in this salary question that we were discussing a little while ago.

Q. You will take care of that?

A. That will be taken care of.

Q. During the recess?

A. Yes, sir.

Q. All right. Traveling expenses of twelve hundred dollars; have you analyzed that account and can you now tell us how that was arrived at?

A. Yes, sir. The item represents for the year,

Mr. Meyer, \$3,900., and various miscellaneous traveling expenses of Mr. Steeple and others, which goes through petty cash, of \$468.75, making a total for the year, \$4,368.75. That was allocated on the period basis, that is, 105 over 365. In other words, we charged in there twelve fifty-sixths—we get a round figure of twelve hundred dollars. It actually works out to \$1,256.85. We used twelve hundred dollars as a round figure.

Q. All right, now, then,—

THE COURT:

Well, I don't see how you can claim—

BY MR. HIRSCH:

Q. Then I don't know how you can allocate that. Can you determine this on an actual basis by going through your records?

A. Well,—

Q. Determine what actually was incurred for traveling expenses during that period?

A. Mr. Meyer received seventy-five dollars a week to cover traveling expenses.

THE COURT:

Oh.

BY MR. HIRSCH:

Q. And he received that during this period?

A. Yes, sir.

MR. HIRSCH:

Well, it will be up to us to support whether he used it, because, frankly, if he didn't use it we can't claim it, even though he received it.

THE COURT:

Well, why, not eliminate it, then? I mean, I am not going to spend three or four days—

MR. HIRSCH:

All right, let's eliminate it for the present.

THE COURT:

—going back and forth on the thing.

MR. HIRSCH:

All right.

Cross Examination (Continued)

BY MR. SIMONS:

Q. Just to ask you one question, you said Mr. Meyer received seventy-five dollars a week for traveling expenses?

A. Yes, sir.

—Q. Where is your schedule of this, from which we were reading before?

A. Which one do you mean, the salaries?

Q. No, that one—this is it.

A. Oh.

Q. Your wage schedule is the one I want. This is the summary for the year. You had another. This is it.

MR. SIMONS:

If Your Honor please, in view of what Mr. Langer says about the seventy-five dollars traveling expenses, we have been charged with seventy-five dollars a week in the matter of salaries—

THE COURT:

Oh, I don't—

BY THE COURT:

Q. Is that so?

A. Yes, but this seventy-five dollars is in addition, has nothing to do with salaries, this is purely traveling expense.

THE COURT:

Yes, that is what I thought.

BY MR. SIMONS:

Q. Well, does that represent this seventy-five dollars—

A. No, sir.

Q. —that you have charged here for officers?

A. No, sir.

Q. There is another item of seventy-five dollars?

A. Seventy-five dollars paid to Mr. Meyer for traveling expenses over and above the amount shown in salaries.

THE COURT:

Well, that is clear enough.

MR. SIMONS:

I want to check this item.

BY MR. SIMONS:

Q. Now, you have Mr. Meyer down here for \$10,125?

A. Yes, sir.

Q. Does that include the seventy-five dollars traveling expenses?

A. No, sir.

Q. Is there a separate item of seventy-five dollars per week paid to Mr. Meyer as traveling expenses?

A. Yes, sir.

Q. Does that appear on your books?

A. Yes, sir.

Q. Will you show me where you have an item of seventy-five dollars per week to Mr. Meyer for traveling expense?

A. Yes, sir.

MR. HIRSCH:

Well, I won't withdraw this item if Mr. Simons is going to prove it.

MR. SIMONS:

It is not a question of my proving it.

THE COURT:

It is all right, if he does prove it I will reinstate it. I don't know whether it will result in it or not. The item has been withdrawn. I really don't see what is the purpose of going on.

MR. SIMONS:

Your Honor, what I am trying to check is this. We have been charged with seventy-five dollars a week,—

THE COURT:

Yes.

MR. SIMONS:

—and I simply want to check now whether

that is the same seventy-five or another seventy-five.

MR. HIRSCH:

The witness says, "No".

THE COURT:

Well, why don't you let your accountant look at the books? They are all here.

MR. SIMONS:

All right, may we? All right.

MR. HIRSCH:

You are through with that item?

MR. SIMONS:

Yes.

THE COURT:

All right, that twelve hundred dollars—

MR. HIRSCH

Is eliminated.

THE COURT:

—is finally eliminated. Now, go ahead.

Direct Examination (Continued)

BY MR. HIRSCH:

Q. Now, Pennsylvania capital stock tax, \$2,-720.60, is what we are asking. Since yesterday have you analyzed that account and can you support it with your actual expenditures?

A. Yes, sir.

Q. And do you have the capital stock tax returns and actual payments for this period?

A. Yes, sir.

Q. That, of course, necessarily would be on an allocated basis, would it not?

A. Yes, sir.

Q. And how much of the \$2,720.60 can you support by your returns and actual expenditures?

A. The actual—it works out to \$2,702.86.

Q. So we must amend, then, that item from \$2,720.60 to \$2,702.86?

A. Yes, sir.

MR. HIRSCH:

That is a deduction, Judge, of—I will have to figure that out.

THE COURT:

Well, that doesn't matter, that is all right.

MR. HIRSCH:

Deduction of \$17.74.

THE COURT:

Yes.

MR. HIRSCH:

That is all on that item. Mr. Simons, do you want to ask any questions?

THE COURT:

Well, gentlemen, have you anything to say about it?

MR. SIMONS:

If Your Honor please, we are checking these figures now. What was the figure that you have?

MR. HIRSCH:

\$2,702.86.

MR. SIMONS:

Well, the difference isn't very great. Just note the capital stock tax return—the reason for my taking time—the capital stock tax return was filed on a fiscal year, of June 30, 1937, and then for the balance on the calendar year, and I was just computing if there was any difference in taking it for the balance of the calendar year and half of the fiscal year, instead of just half of the fiscal year, as it was computed here. The difference is so slight that it doesn't make any difference.

MR. HIRSCH:

Well, this item is \$2,702.86,

MR. SIMONS:

May we, however, object to this charge, if Your Honor please, more specifically, because of the fact this is not a question of operation. This charge is a charge that they would have to pay whether they were operating or not operating.

MR. HIRSCH:

That is just the point.

THE COURT:

Oh, yes, we agree to that, I understand that, but I will change the ruling striking it out, and I will permit it to go to the jury in the amount of \$2,702.86.

BY MR. HIRSCH:

Q. Now, on the question of dues and subscriptions, for which claim was made of \$1,743.03, have you analyzed that more fully since yesterday?

A. Yes, sir.

Q. Are you able to tell us what items go to make up that claim, and eliminate from your consideration any donations or contradictions that may have been made, but only consider the moneys that had to be expended by reason of membership in organizations and otherwise?

A. Yes, sir.

Q. And, then, tell us the amount of our claim on that.

A. Mr. Steeple, will you get those bills out?

Q. There you are. Are you ready?

A. Yes.

THE COURT:

Go ahead, please.

THE WITNESS:

The Full Fashioned Hosiery Association, the annual dues for the fiscal year ended August 31, 1937, that was prorated, and two hundred and thirty-nine dollars was—\$239.20 was chargeable to the period.

BY THE COURT:

Q. All right, what is next?

BY MR. SIMONS:

Q. What is the total of the bills, Mr. Langer?

A. Why, \$553.20.

THE COURT:

Go ahead.

THE WITNESS:

Next, National Association of Hosiery Manufacturers, that is annual dues for the

fiscal year ended 6-1-36 to 6-30-37—or, 5-31-37. That was \$582.34, of which \$93.16 was allocated to that particular period.

BY MR. HIRSCH:

Q. That is the year before. How about the following year, from '37 to '38?

A. And 6-1-37 to 5-31-38—

Q. Was how much?

A. We have allocated \$309.66. The total amount of that bill is \$1,411.27.

Q. Now, wait a minute, I don't understand. How could you allocate to a succeeding period the dues that were due for the preceding period?

A. Because on this period, 5-31-37, this other item didn't terminate until May 31, 1937, so there was a small balance in there, \$93.16, on that old period, and then, of course, on the new item, the new item, 6-1-37 to 5-31-38, the total, I think, is \$1,411.27.

Q. I see.

A. We allocated that portion to that period.

Q. All right.

A. \$309.66. And then we had another bill there for a thousand dollars, of which we made an allocation, there was a thousand dollars, and we allocated \$288. to this particular period.

Q. What is that bill for?

A. I think it is marked publicity fund.

Q. From what association?

A. That is the National Association of Hosiery Manufacturers.

Q. Do you know whether or not that represented an assessment? Does the bill show?

MR. SIMONS:

Just the publicity fund.

THE WITNESS:

And then there was another bill there representing assessments, I believe, for \$825., of which that was allocated on the same basis, namely, \$237.60 for this particular period.

BY MR. HIRSCH:

Q. And what is the total of our claim; therefore, for dues and subscriptions?

A. The total claim is \$1,743.03.

THE COURT:

Well, is that satisfactory, Mr. Simons?

MR. SIMONS:

What was that, Your Honor?

THE COURT:

\$1,743.03.

MR. SIMONS:

Well, I am checking the bills here.

THE COURT:

Gentlemen, let me speak to you a minute here. Now, the case can't go on this way. I am not going to permit it. Will you come up here?

MR. SIMONS:

Yes.

THE COURT:

We have got to arrange some method by

which our time won't be wasted in this fashion.

(Discussion at side bar.)

Cross Examination (Continued)

BY MR. SIMONS:

Q. Now, Mr. Langer, do you have any idea as to how these bills are made up, when you have a bill from December 1st, 1936 to May 31st, 1937 for \$698.81?

A. You mean how it is made up?

Q. Yes, what is that for?

(The bill was shown to the witness.)

A. Nothing except what it states, specifically states on the bill. It says for semi-annual dues covering the period as stated on the invoice.

BY MR. SIMONS:

Q. You have another bill for \$1,411.27. This is from the National Association?

A. That is correct.

Q. Now, who is the Full Fashioned Hosiery Association here in Philadelphia?

A. You say who are they?

Q. Yes.

A. I don't know.

Q. Do you know who the National Association of Hosiery Manufacturers are?

A. No, sir.

Q. Do you know whether it is a club or an organization,—

A. I do not.

Q. —or trade association?

A. I do not.

Q. Do you know anything about this Full Fashioned Hosiery Association here in Philadelphia?

A. No, sir.

Q. Do you know the purposes, aims, purports of this organization?

A. No, sir.

Q. Do you know whether it is a publicity organization, or whether it is a matter of just a social organization?

A. I do not.

Q. Well, there is no doubt that there was a publicity fund of two thousand dollars for which you were billed and which you computed as part of the charges?

A. That is correct.

Q. Do you know what this publicity was for?

A. No, sir.

Q. Now, you have computed—

THE COURT:

Well, now who does know? All right, Mr. Meyer. Will you stand aside a minute? Mr. Meyer, will you take the stand?

(Witness withdrawn.)

WILLIAM MEYER, recalled.

Redirect Examination

BY THE COURT:

Q. Now, will you kindly—you have been sworn—will you kindly tell us and the jury what your con-

tributions and dues are? What are these various associations?

A. The Philadelphia Association is chartered under the—or, was chartered under the State of Pennsylvania—

BY MR. SIMONS:

Q. What are its purposes, who were its members, and what did it do?

THE COURT:

Well, now, just a minute, the Court has called this witness.

MR. SIMONS:

Oh, I am sorry.

THE COURT:

I am asking the question.

BY THE COURT:

Q. Now, you go ahead and tell us.

A. It was an organization that was started, as nearly as I can remember, back in 193—

Q. Oh, we don't care about that.

A. —'4 or '5.

Q. What is the purpose of the organization?

A. Well,—

Q. What do you get for your money when you pay—

A. Generally, generally the work of the association, to take care of the interest of the manufacturers and the welfare of the general industry, of promotion—

Q. An ordinary trade association?

A. That is what it is, yes.

Q. What is the next association?

A. And the other one is the National Association, which is also an association, I believe chartered under the State of New York, if I remember correctly, and of which Mr. Constantine, who was here yesterday morning, is the president.

Q. Yes.

A. That is the regular trade, national trade association, taking in the entire United States.

Q. To promote the interests of the industry—

A. And the welfare.

Q. —in every legitimate way, I assume. Well, what is the contribution to the publicity fund?

A. Why, the contribution of the publicity fund was the amount of money asked for under an assessment, of which we paid our proportion.

Q. It is a regular assessment?

A. It was an assessment, special assessment made for that purpose.

Q. Was it a voluntary contribution or an assessment?

A. It was an assessment.

Q. Part of your dues?

A. Yes, sir.

THE COURT:

All right, now, was there any other item there?

Recross Examination

BY MR. SIMONS:

Q. Well, you have an item here for an assessment on April 15, 1937 for \$825.

A. That is right, assessments were made regularly at the time of the board of directors meeting, and these assessments were made.

THE COURT:

All right.

THE WITNESS:

I happen to know that because I was president of the association at that time and sat in those meetings when those assessments were made.

BY MR. SIMONS:

Q. You paid your regular dues of \$825.?

A. That is correct.

Q. And paid an assessment of \$825.—

A. That is correct.

Q. —on April 15, 1937?

A. That is correct, yes.

Q. And on May 22nd, 1937 there was a publicity fund of two thousand dollars. What was the publicity for?

A. It wasn't used for publicity fund. It was used for the regular expenses of the association.

Q. But you marked it "Publicity fund"?

A. Well, it wasn't used for that purpose.

MR. SIMONS:

If Your Honor please, I don't believe that these are items that are chargeable in the regular course of business to this thing.

THE COURT:

I think they are all properly chargeable in the regular course of business, and I will overrule your objection and allow the items.

Now, that is all, Mr. Meyer. Let's go on.

JOSEPH C. LANGER, recalled.

Direct Examination (Continued)

BY MR. HIRSCH:

Q. The next item, Mr. Langer, is an item of general expense, \$728.53. That is an allocated sum based on the general expense of the business throughout the year?

A. Yes, sir.

THE COURT:

How much is that, and where is it?

MR. HIRSCH:

\$728.53.

THE COURT:

I don't seem to have that. Was that objected to yesterday?

MR. SIMONS:

Yes, it was, if Your Honor please.

MR. HIRSCH:

Yes, we withdrew it temporarily.

MR. SIMONS:

It was allocated out of general expense for the year and objected to.

THE COURT:

\$728.53?

MR. HIRSCH:

Right.

BY MR. HIRSCH:

Q. What does that represent?

A. It is just miscellaneous items of expense, just minor items.

Q. Well, do you know whether they were incurred during this period?

A. As an allocation made.

Q. As an allocation made?

A. Yes, sir.

THE COURT:

Well, then, you can't tell.

MR. HIRSCH:

I think you ought to withdraw it.

THE COURT:

Strike it out.

MR. HIRSCH:

Strike it out.

THE COURT:

Here it is, that is all right.

MR. HIRSCH:

General expense, \$728.53.

THE COURT:

I see where it is now. Now, that is out. Now, go ahead.

MR. HIRSCH:

Now, that leaves one item, heat and light. Will you come down and let Mr. Steeple take the stand? We have been working on this item, trying to break it down.

THE COURT:

Very well.

MR. HIRSCH:

Just stand aside. You aren't through with cross examination yet.

(Witness withdrawn.)

MILTON S. STEEPLER, recalled.

Redirect Examination

BY MR. HIRSCH:

Q. You have been sworn, Mr. Steeple. At my request have you worked on the item of heat and light since yesterday?

A. I have.

Q. And are now in a position to support by actual payments made during the period of May 6th to August 19th some figure for heat and light?

A. I am.

BY THE COURT:

Q. Now, that is all we want to know. How much was actually paid for heat and light during that period, or, rather, for heat and light used during the period May 6th to August 19th?

A. Well, the bills rendered in those periods totaled \$3,749.10.

THE COURT:

Well, that is more than you claim.

MR. HIRSCH:

That is right. Well, that is because we have now got it on an actual basis.

THE COURT:

\$3,749?

THE WITNESS:

\$3,749.10.

THE COURT:

All right, cross examine, please.

Recross Examination

BY MR. SIMONS:

Q. May I see it?

A. Here is the schedule.

Q. Where is this \$1,123.45, from August?

(Witness indicated the item.)

BY MR. SIMONS:

Q. Now, you have one bill from April 28th to June 2nd?

A. Yes.

Q. \$875.93?

A. Yes.

Q. And you charged through the full amount in your computation of that figure?

A. Correct.

Q. And there is no breakdown that you have from May 6th?

A. Not down to May 6th. It isn't possible to do that with that bill.

THE COURT:

Well, gentlemen, to be absolutely on the safe side I will take a thousand dollars off that, and won't submit it to the jury, and allow it

in the amount of \$2,084.46, so there can be no question whatever about it.

MR. HIRSCH:

Then you are taking off seventeen hundred.

THE COURT:

No.

MR. HIRSCH:

It was \$3,749.10.

THE COURT:

Oh, that is so. Well, then, I will allow it in the amount of \$2,749.10.

MR. HIRSCH:

All right.

THE COURT:

Strike out a thousand dollars of that. Now, there can't be any possible question about the rest. You go ahead and examine as long as you want.

MR. SIMONS:

Now, I just want to check—

THE COURT:

I just want to keep this safe, and it is not particularly scientific, but it is reasonably accurate. In the long run that is where we are going to get.

I am also going to take a thousand dollars off the insurance item, because of the fact that the workmen's compensation insurance in the amount properly allocated is probably less to some extent owing to the deduction of payroll, but I don't think there can be any ques-

tion about a thousand dollars being on the safe side there, so that will be allowed in the amount of \$1,195.10.

MR. SIMONS:

My objection goes to that. Just so the record is straight, you mean that is admitted into evidence? It is not a question of allowance, you feel that that is an admissible item?

THE COURT:

Oh, yes, I think it is an admissible item—

MR. SIMONS:

So we get it straight.

THE COURT:

—to the extent of \$1,195.10. In fact, I think it is admissible to considerably more than that, but I think that that allows for any possible inclusion of too much compensation insurance, and I think the same is true with regard to the light proposition.

MR. HIRSCH:

Well, that leaves only one item, then. Come down, Mr. Steple.

THE COURT:

There is a slight overlapping there, there is a little more than there should be, but it isn't as much as that.

MR. HIRSCH:

That leaves one item, then, two items, of five thousand, on that wage item, and shipping wages, some fifty-six hundred dollars in wages which were actually expended.

THE COURT:

I don't know what the five thousand wage item is.

MR. SIMONS:

Indirect labor.

MR. HIRSCH:

Indirect labor.

THE COURT:

Well, I didn't do anything about that, did I? That is the one you are going to come back on. I haven't ruled on that?

MR. HIRSCH:

All right, that completes all the items that are open.

THE COURT:

\$3,672 of mill supplies has been ruled out.

MR. HIRSCH:

Correct.

THE COURT:

\$83 of factory expense is withdrawn.

MR. HIRSCH:

\$83.32.

THE COURT:

.32?

MR. HIRSCH:

\$83.32.

THE COURT:

All right, \$97.43—now, some of you accountants get your pencils out and let's take

these down as we go along and add them up, so we see where we stand.

Now, the following items the Court rules are not supported by sufficient evidence and will not be submitted to the jury, out of the total claim for overhead of \$122,742.95. They are, first, \$3,672.58 of mill supplies.

MR. SIMONS:

Now, that is taxes and water rent, if Your Honor please.

MR. HIRSCH:

No, that is right, it is mill supplies.

THE COURT:

I think it is mill supplies,—

MR. HIRSCH:

\$3,672.58.

THE COURT:

—unless I am way off.

MR. SIMONS:

Yes.

THE COURT:

All right. \$1,000 of the item of insurance; \$1,000 of the item of heat, light and power; \$83.32—

MR. HIRSCH:

Pardon me, sir, you can't do it that way.

THE COURT:

Yes, I can.

MR. HIRSCH:

Instead of a thousand, it is \$335.36 from the original figure.

THE COURT:

This is what I am disallowing:

MR. HIRSCH:

Will you increase the figure from three thousand to thirty-seven hundred?

THE COURT:

What is the use?

MR. HIRSCH:

The actual deduction is only three hundred and thirty-five from what we originally asked. We increased it to thirty-seven hundred.

THE COURT:

All right, I will deduct—\$3,749.10—I am deducting a thousand dollars from that claim. Now, don't fuss about it.

MR. HIRSCH:

All right.

THE COURT:

Don't fuss about these figures.

The item of general factory expense which we had of \$83.32, which has been withdrawn; the item of rental—oh, yes, that is to be subject—wait a minute—that is subject to a check-up; the item of freight \$97.43, withdrawn; the item of shipping wages of \$525; the item of traveling expenses of \$1200—

MR. HIRSCH:

Pardon me, the shipping wages will be in that other item of wages. Those two together we are coming back on.

THE COURT:

All right, don't put that in your list.

Item of telephone of \$241.39, the item of legal and accounting, a part of that item amounting to \$538.28; amount of office expense, item of \$309.61; the item of postage, I guess it is, of \$337.34—what is this \$728 item?

MR. HIRSCH:

General expense.

THE COURT:

General expense, the amount of general expense, item of \$728.53; and a Social Security tax item amounting to \$967.23. Now, those items the Court is ruling are not supported by sufficient evidence. Add them up, will you, please?

There are two more items that will be ruled on when the comparisons are made. They are the boarding forms of \$1,931.52, shipping wages of \$525., and what is the other item, indirect labor of how much?

MR. HIRSCH:

Well, the boarding forms, sir, was admitted.

THE COURT:

No, no, he was going to see whether there was anything in the lease—

MR. HIRSCH:

Oh, no, I will tell you now, there is nothing in the lease. You can allow that.

THE COURT:

All right, then, that is admitted, then, don't bother with it. That is admitted.

Well, then, the only thing left for checking up is \$525 shipping wages?

MR. HIRSCH:

And \$5,098.82.

THE COURT:

And \$5,098.82.

MR. HIRSCH:

From fifty-six hundred, and to save time on that, if you want to end it, I will agree to a figure of four thousand, if they want to do it.

THE COURT:

Is that satisfactory?

MR. HIRSCH:

They are actually wages expended.

MR. SIMONS:

What is that?

MR. HIRSCH:

Fifty-six hundred to four thousand. Let's get rid of this.

THE COURT:

Then we eliminate how much of the claim? I have to do it by subtraction.

MR. SIMONS:

If Your Honor please, I think the allowance ought to be more than that.

THE COURT:

All right, go ahead, prove it, then.

MR. HIRSCH:

Then prove it. We won't allow anything.

THE COURT:

Go ahead, don't allow anything, that is all right. How much is that?

THE WITNESS:

I figure \$10,175.71.

THE COURT:

Total deductions by the Court are—

MR. LADENHEIM:

I have figured \$10,175.71.

MR. HIRSCH:

You both agree, all right.

THE COURT:

\$10,175.71, those are the present deductions made by the Court, and the thing to be further considered is this one item of indirect labor.

MR. HIRSCH:

All right, that concludes the items, and you have further examination?

THE COURT:

Well?

MR. SIMONS:

In order to complete this whole thing, suppose we just let that labor item go, instead of taking up all the necessary time.

THE COURT:

Eliminate sixteen hundred dollars of it, then?

MR. SIMONS:

All right, let it go at that. We won't waste any more time.

THE COURT:

All right, then, he eliminates sixteen hundred dollars more of the labor item.

MR. HIRSCH:

\$11,775.71.

THE COURT:

\$11,775.71?

MR. HIRSCH:

Deducted.

THE COURT:

Now, that is the total amount as to which the ruling now is that it is not supported by sufficient evidence. The balance of the claim will be submitted to the jury.

MR. HIRSCH:

I will give you that figure in a moment, sir —\$110,947.26.

THE WITNESS:

967.

MR. HIRSCH:

967?

THE WITNESS:

.24.

MR. HIRSCH:

\$110,967.24.

THE COURT:

Well, you will understand, of course, members of the jury, that the defendants in this case did not agree to that figure, but the Court rules that that figure is supported by sufficient evidence for you to pass upon it and determine whether it is a correct figure or not.

This all has to do, what we have been talking about now all has to do with what we will call the overhead expenses of the business which were properly chargeable against the period of May 6th to August 19th, during which the plaintiff claims that the plant was shut down by the defendants. In other words, these are items of loss, these are items which the plaintiff says had to be spent anyhow, and as the plant was not working, they were a dead loss for that period. They were not producing anything, and nothing was coming back during that period. That has not anything to do with the item of loss profits, which is the next one we are going to get to. This is the item of what we call dead loss from continuing charges that had to be paid to keep the business in existence during the period when they could not operate.

MR. HIRSCH:

Now, then, do you want to recess?

THE COURT:

Yes, I will now recess for ten minutes.

(Recess at 11:30 A. M.)

After Recess

Present: Counsel as before noted

Plaintiff's Evidence (Continued)

JOSEPH C. LANGER, recalled.

Cross Examination (Continued)

BY MR. SIMONS:

Q. May I see your statement for 1937 for which you have computed the profit and loss as of May 6th, 1937?

THE COURT:

Well, now, as I understand it, so far no figure of lost profits has been given. All he has testified to is the experience of the prior six months or so.

MR. SIMONS:

That is right.

MR. HIRSCH:

He has given the profit for the period January 1st to May 6th.

THE COURT:

Yes, which was an average of \$6,111 a week, and twenty-seven cents a dozen.

MR. HIRSCH:

And a total in dollars of \$110,575.50.

THE COURT:

Yes.

MR. HIRSCH:

Based on hosiery operations alone.

THE COURT:

The only thing he hasn't given us is the percentage of profit per dollar of gross sales.

BY THE COURT:

Q. Have you got that?

A. No, I haven't. I can figure it out.

Q. Well, it is easy enough to figure it out. Well, do that some time.

A. O. K.

Q. Let's get somebody to do it. The total profits were \$110,575.50, on \$2,284,262.08. Now, will you give me the profit per—

MR. LADENHEIM:

Slightly less than five per cent.

THE COURT:

What?

MR. LADENHEIM:

Slightly less than five per cent.

MR. HIRSCH:

Around five per cent.

THE COURT:

All right. Go ahead, now.

BY MR. SIMONS:

Q. May I see your statement—not your work

sheets; do you have your printed statement, or type-written report?

(The witness produced the statement.)

BY MR. SIMONS:

Q. This is the report for the six months ended June 30, 1937?

A. Yes, sir.

THE COURT:

May I ask a question, whether this was all available to counsel for the defendants, or was it not?

MR. SIMONS:

No, sir, this was not.

THE COURT:

What?

MR. SIMONS:

This was not.

MR. HIRSCH:

All of the books were available to counsel for the defendant. The accountant's report was not available to the accountants for the defendant.

THE COURT:

All right, now, will you go ahead as rapidly as you can, Mr. Simons?

What figure did you get?

MR. LADENHEIM:

4.83. I didn't check it, but I think it is correct.

THE COURT:

What?

MR. LADENHEIM:

4.83.

THE COURT:

All right, about 4.83 cents.

MR. HIRSCH:

Per cent, yes, that is per cent, not cents

THE COURT:

Well, same thing, per dollar—

MR. HIRSCH:

That is right.

THE COURT:

—of gross sales.

BY MR. SIMONS:

Q. You had your sales of \$2,284,262.08; they were the gross sales, were they not?

A. Yes, sir.

Q. Therefore, the net sales were \$2,245,702.89?

A. That is correct.

MR. HIRSCH:

What was that figure?

MR. SIMONS:

\$2,245,702.89; difference of \$38,559.19.

MR. HIRSCH:

That will increase the percentage of profit per dollar.

THE COURT:

Well, on net sales, yes. Well, it doesn't make much difference. It doesn't matter as long as

you carry the same figure through in the shut-down period whether it was gross or net.

BY MR. SIMONS:

Q. Now, in your statement you have figured your depreciation for the six months period on your buildings, machinery and equipment, and you have allocated here four thousand depreciation on building, \$4,061.40, and \$27,883.33. That covers up to the period of June 30th?

A. That is correct.

Q. You have another figure of depreciation which you added to your statement later?

A. No.

Q. I mean, this is not the figure you used for the depreciation on the other statements?

(Discussion off the record.)

MR. HIRSCH:

You better stay there and let Mr. Simons show you these figures, so you know what he is talking about.

BY MR. SIMONS:

Q. And in making up the statement you show no expense for boarding form rentals and expense from May 7th to June 30th?

A. That may be possible.

Q. May 7th to June 30th; why wouldn't you?

A. Because,—

Q. It is only a small item, but why wouldn't you put it in?

A. The reason for it is that the bills for the period came in afterwards, I mean, they weren't paid until subsequently, but they covered those particular months. In other words, when we made up the an-

nual statement those bills had been paid and covered those particular months that we had reference to.

Q. Well, now, you carry your books on an accrual basis?

A. Yes, but that item wasn't accrued at the time.

Q. Well, that would mean, certainly, a decrease in the amount of expense and a decrease in the amount of your profits for that period of time?

MR. HIRSCH:

This was for subsequent to May 6th, and this profit figure he has given is for the period up to May 6th.

THE COURT:

Oh, well, it is only a few hundred dollars out of two million, two hundred and eighty-four thousand dollars. It is so slight—

MR. HIRSCH:

Doesn't enter into it.

THE COURT:

—it is absolutely de minimis. I won't hear any more evidence about it. It isn't worth talking about.

BY MR. SIMONS:

Q. Now, you took no actual inventory at the time on June 30th?

A. As of June 30th, yes.

Q. Was there a physical inventory taken at that time?

A. Some time in July, but as of June 30th.

Q. Now, do you have the figure of the inventory on January 1st and also on June 30th?

A. I believe the inventory figures are here.

Q. You have the inventory figures?

A. Yes, sir.

Q. Now, according to this statement—let me ask you, before I come to this, your dye house operations are run entirely separate and distinct from the hosiery business, is that true?

A. They are.

Q. And your statement is made up separately for that?

A. It is.

Q. And your computations are—that is, the one hundred and ten thousand includes the profits made on both of these items?

A. There is no profits in the dye house operations.

Q. Well, what do you mean, there are no profits in the dye house operations?

A. The actual cost of dyeing is charged to the Apex Hosiery Company at the actual amount of money expended.

Q. In other words, where you have \$53,035.67—suppose you let me understand this.

A. Yes.

Q. You show here \$53,035.67. Now, that is chargeable where?

A. \$53,035.67—

MR. HIRSCH:

Keep your voice up and put it on the record.

BY MR. SIMONS:

Q. That is chargeable as part of the manufacturing expenses?

A. Manufacturing expense.

Q. Now, this profit and loss statement for that period of time shows the net profit for the six months ending June 30th of \$56,546.65?

A. That is correct.

Q. That is, you are deducting here the charges that you are making from May 7th to June 30th?

A. That is correct.

Q. And do you have the statement of the business for the year 1936?

A. I don't have it here.

MR. HIRSCH:

What do you want, the total volume?

MR. SIMONS:

No, I want the statement. You had it here yesterday.

THE WITNESS:

I don't have it here. It may be down there, but I don't have it here.

BY MR. SIMONS:

Q. Let me see your capital stock reports. Do you have your general ledger here?

A. Yes, sir.

Q. That will reflect the profit and loss statement, will it not?

A. Yes, it will.

MR. HIRSCH:

You want to know the profit and loss for 1936?

MR. SIMONS:

That is right.

THE WITNESS:

Oh, we have that.

BY MR. SIMONS:

Q. You have your profit and loss for '36 here?

A. I mean, I have the figures here.

Q. Well, that is all right.

(The ledger was produced.)

THE WITNESS:

I just have the sales. I don't have the profit.
I thought I did, but I don't.

BY MR. SIMONS:

Q. You don't have that. Let me have your capital stock reports that you had before. Let me have the one for the previous year.

A. This is July 1st, '36. That is the fiscal period.

Q. Now, in preparing the capital stock report you show the profits or losses for a period of five years,—

A. Yes, sir.

Q. —is that correct, and then you average what your profits or losses are over that period of time?

A. That is correct.

Q. Now, these figures are exact figures from your books and records of the company?

A. They are.

Q. They show the actual assets, the net income or loss for that period of time?

A. They do.

Q. And the amount of dividends paid?

A. Yes, sir.

Q. The only thing we are concerned with is the question of the profits or losses. Now, referring to this statement that you had filed, capital stock report that you filed in 1936, you carried your books at that time on a fiscal basis ending June 30th?

A. No, the books were always closed—had been closed for the last—I don't know how many years, but for a good number of years, on a calendar year basis, but the State return was filed on a fiscal year basis.

Q. But the profits or losses would reflect the profits or losses for that period of time?

A. For what period of time?

Q. For the fiscal year.

A. For the five years?

Q. June 30th to June 30th.

A. That is correct.

Q. Now, it shows in 1936 there was a loss of \$184,896.33.

MR. HIRSCH:

Is that the calendar year or is that the fiscal year?

THE COURT:

Fiscal year.

MR. SIMONS:

The fiscal year. Well, I thought it might be simpler to take it that way, because you have a half of a year.

THE COURT:

All right, it doesn't matter.

MR. SIMONS:

We are computing it.

BY MR. SIMONS:

Q. Now, 1935 shows a loss of \$149,223.40?

A. May I see that?

Q. Yes, certainly.

A. Yes, that is correct.

Q. 1934 shows a loss of \$372,713.04?

A. That is correct.

Q. 1933 shows a loss of \$344,874.84?

A. That is correct.

Q. Now, this is the results of your losses sustained during those fiscal years?

A. Yes, sir.

Q. And in 1937, for that six months period, it is only a six month period which you reported,—

A. Yes, sir.

Q. —you reported \$68,938.62 as a profit?

A. That is correct.

Q. That is correct.

MR. HIRSCH:

Is that for the year from June to June, or is that the last six months?

MR. SIMONS:

No, that is for the—

THE WITNESS:

No.

BY MR. SIMONS:

Q. No, that would be for your year?

A. That is for the year.

Q. That is for the year?

A. Yes.

Q. That covers from June 30, 1936 to June 30, 1937?

A. That is right.

Q. That is correct, isn't it?

A. That is right.

Q. So, therefore, that whole year showed a profit of sixty-eight thousand dollars?

A. Yes.

Q. Right. Now, there is a fluctuation of the amount of business that is done in the several months of the year, is there not?

A. There might be a fluctuation.

Q. Yes, by that I mean there are peak months and then there are lean months during the course of a year, they don't all average the same?

A. That is correct.

Q. And in your experience, as a rule, aren't June and July and August leaner months from the point of view of sales than, let us say, March, October, November?

MR. HIRSCH:

How about September?

A. I would say the peak period, the peak period of sales is around July—

THE COURT:

That is not the question. The question is whether June, July and August are lean months compared to the months of March, November—

MR. SIMONS:

December.

THE COURT:

March, October and November.

MR. SIMONS:

Yes.

MR. HIRSCH:

Is it a question of sales or shipments?

THE COURT:

Question of sales.

MR. SIMONS:

Sales.

THE WITNESS:

I couldn't answer that off-hand, unless I referred to my records.

THE COURT:

Well, refer to your records. What is the fact, gentlemen? You ought to know that. You are all in the hosiery business.

MR. HIRSCH:

The fact is June and July are the biggest months for sales during the year.

THE COURT:

All right.

MR. HIRSCH:

Because it is during those two months that you sell for the rest of the year.

THE COURT:

All right, then, let's go into it.

BY MR. SIMONS:

Q. Do you have your sales, sales records here?

A. Yes, sir.

Q. Where are they?

A. Sales book.

MR. HIRSCH:

Now, I am going to object to this cross examination at this time, for several reasons. First, examining on the sales for the subsequent period has as yet no relevancy until we produce testimony to that effect. In other words, it is not proper cross examination. This man has not been asked in direct examination anything about sales after the period of May 6th. I did try to get in our profit and loss for the period of May 6th—

THE COURT:

Are you going to ask him—

MR. HIRSCH:

—to the end of the year, and that was refused.

THE COURT:

Are you going to ask him about the sales? Is this witness all through? In other words, are you going to ask him—

MR. HIRSCH:

No, I am not going to ask him. I am going to put Mr. Meyer on for sales. This witness is the auditor.

THE COURT:

I understand. Are you going to ask him to make an estimate of profits during the shut-down period?

MR. HIRSCH:

After Mr. Meyer has testified.

THE COURT:

Yes, well, then, I—

MR. SIMONS:

My purpose is to show, Your Honor, not the question of sales afterwards, as much as to show that there is, while the witness is on the stand and has the books and records, that there is a variance in the months.

THE COURT:

Well, we agree to that. Everybody knows that. You can't tell exactly the same amount of ho-siery in each month.

MR. SIMONS:

Yes, I know that there is very much less in certain months than in others, according to analysis.

THE COURT:

Well, I will hear that much of it. It ought to be a very simple matter to establish what are your peak months.

MR. HIRSCH:

Well, I thought—the reason I am objecting is that I want to ask it in my way, through the man who does the selling.

THE COURT:

Mr. Meyer?

MR. HIRSCH:

Mr. Meyer

THE COURT:

What difference does it make? Establish it any way you can. The figures are down there. There must be figures there.

BY MR. SIMONS:

Q. Where is the transfer ledger?

THE COURT:

If you haven't got the figures ready, go on to something else. We are not going to spend five minutes looking for them. Go on to the next question and do it later. Don't spend any more time on this. I thought you had them here.

MR. SIMONS:

I have the analysis of them here. I wanted to check it.

THE COURT:

○ All right, let me see it.

(Discussion at side bar.)

BY THE COURT:

Q. Now, this is a sales record I am reading. It says sales record. Isn't that a sales record? Is that sales or shipments?

A. I didn't make that.

THE COURT:

Who made it?

THE WITNESS:

Mr. Ladenheim.

MR. SIMONS:

Is that sales or shipments?

MR. LADENHEIM:

That is shipments.

THE COURT:

That is not a sales record. What is the use

of bothering with it? Take it away. He has got it marked "sales record".

MR. LADENHEIM:

It is the sales account of the ledger.

THE COURT:

Well, it is actually shipments. Now, if you have anywhere a comparative statement showing the sales made month by month let us have it now. If you haven't got it—

MR. SIMONS:

Well, may I say this, Your Honor, there is no record kept of sales made because they are entered in the books, and that is a matter of bookkeeping, as to whether they are entered when the order is received or whether they are entered when they are shipped. Now, I don't know how they do it.

BY MR. SIMONS:

Q. How do you keep your sales records?

A. They are entered in this sales book in detail.

Q. When?

A. Daily.

BY THE COURT:

Q. As the sales are made?

A. As the sales are made.

Q. All right, then, you will be able to get that this afternoon?

A. Yes, sir.

THE COURT:

Go ahead.

THE WITNESS:

I can get it very shortly.

BY MR. SIMONS:

Q. And the sales in this book would be entered the day the sales are made?

A. Not the—

Q. The total would be entered—

A. At the end of the month.

Q. At the end of the month?

A. Cumulated in this record and entered at the end of the month.

MR. SIMONS:

Well, then, this would be the record taken from their books.

MR. HIRSCH:

Of the shipments—

THE COURT:

Well, will you please go on to another item and let this one go until we get that testified, is that correct? He is going to be recalled—

THE COURT:

Oh, well, we will take care of that—

MR. HIRSCH:

All right.

THE COURT:

—as it arises.

MR. HIRSCH:

All right.

THE COURT:

It isn't important. Now, go ahead, gentlemen.

WILLIAM MEYER, recalled.

Direct Examination

BY MR. HIRSCH:

Q. Mr. Meyer, before we get into the purpose for which I am calling you, reference was made yesterday in the examination of Mr. Langer to the New York office, and he was asked questions which he couldn't answer, but I want to ask you the same questions. You have a New York office?

A. Yes.

Q. And there was expense charged in the records of the Apex as to which Mr. Langer testified?

A. That is right.

Q. And he was questioned about a mill up at Spring City of some other company as having some part of that sales office, and therefore implying that that sales office expense should be shared in some way. During the year 1937 did any other company occupy that office for any reason whatsoever?

A. No. The company referred to had its own office in the Empire State Building. The other one is down at the Fifth Avenue Building, 200 Fifth Avenue.

Q. The other one; you mean the Apex office.

A. That is right, the Apex office.

Q. Yes, and did any employee in the Apex office work for any other company or do any other work other than Apex business?

A. Not to my knowledge.

Q. You hope not?

A. I hope not.

Q. And the rent you paid for the office was solely for the use by Apex?

A. That is correct.

Q. All right. Now, Mr. Meyer, are you familiar, thoroughly familiar, with the women's full fashioned hosiery industry in the year 1937?

A. Yes.

Q. And you have heard reference made to the National Association of Hosiery Manufacturers?

A. Yes.

Q. And I think until Mr. Constantine was withdrawn from the stand he said that it comprised about eighty-five per cent of the mills of the country?

A. Mill production.

Q. Production?

A. Of the full fashioned, and about seventy some odd per cent of the seamless.

Q. You are only in the full-fashioned end?

A. Yes.

Q. My questions that I am going to ask you only relate to full fashioned hosiery.

A. Right.

THE COURT:

Now, let me ask you something before you go on. Are you going to endeavor to show, or are you going to apply the percentage of profit to a larger volume of business than was

done during the preceding six months? Now just answer my question, see if we can't get somewhere.

MR. HIRSCH:

- I can't—

THE COURT:

In other words, do you expect—do you expect to ask the jury to allow you five per cent profit—we will say it is five; 4.83—on a large business than the average business shown during the six months preceding May 6th?

MR. HIRSCH:

During the four months preceding.

THE COURT:

Well, whatever it is.

MR. HIRSCH:

No.

THE COURT:

No.

MR. HIRSCH:

I intend to—

THE COURT:

Well, then, isn't all this rebuttal testimony? Don't we start with the presumption, isn't it a fair presumption until it is contradicted, that the business will continue the same as it was during the first four months of the year—that is all you are going to ask for—and do you need any testimony as to the state and condition of the business? If the business ran into depression, or there were some extra-

ordinary reasons that you would not do that business, isn't that a matter of defense? It would seem so to me. Aren't you proving more than you are required to prove?

MR. HIRSCH:

I may be doing that, yes, sir. I mean, some of the cases indicate that I need not do any more than show the profit during the immediate preceding period,—

THE COURT:

Well, that is what I—

MR. HIRSCH:

—and for the defense to show—

THE COURT:

That is what I would think.

MR. HIRSCH:

But I am perfectly willing to meet the burden of inquiry by a few general questions of this witness, and I would like to do that. I think the jury would be entitled to that, rather than my arguing merely on a presumption. I would prefer to do it this way, sir. I am assuming a burden—

THE COURT:

Well, I know.

MR. HIRSCH:

It won't take very long.

THE COURT:

Well, what does the defendant—

MR. HIRSCH:

I think the jury is entitled to it.

THE COURT:

What does the defendant say about it? Do they want it done this way, too?

MR. KATZ:

We think—

THE COURT:

If everybody wants it proved this way I am not going to—

MR. KATZ:

We think, if Your Honor please, if they attempt to prove anticipated profits the burden is upon them to show they would have anticipated in the future the same amount of business as for a reasonable time in the past.

THE COURT:

Then you want him to prove it the way he is doing it?

MR. KATZ:

I do.

THE COURT:

All right. Well, then, I won't be the only one to object, but still I don't think it is necessary.

BY MR. HIRSCH:

Q. Now, what position did you occupy with the National Hosiery Association, the National Association of Hosiery Manufacturers?

A. In 1937?

Q. Yes, in 1937.

THE COURT:

Now, then, you said it was going to be a few general questions.

MR. HIRSCH:

All right.

BY MR. HIRSCH:

Q. You are a member of the board?

A. Yes.

MR. HIRSCH:

Let me lead him on this.

A. (Continued) By the fact I was a past president of the association.

BY MR. HIRSCH:

Q. Prior to 1937 you were the president of the association?

A. Prior to that, yes.

Q. Now, were you thoroughly familiar with conditions in the hosiery industry, and if so, how did you acquire that familiarity?

A. Why, through my connections with the National Association and through the local association, and through my contact with my accounts.

BY THE COURT:

Q. Do those associations collect statistics?

A. Yes.

MR. HIRSCH:

I am coming to that.

BY THE COURT:

Q. And publish them?

A. Yes, sir.

THE COURT:

All right.

BY MR. HIRSCH:

Q. The National Association collects statistics for women's full fashioned—

MR. KATZ:

I can shorten this. We will admit Mr. Meyer is excellently competent to testify to conditions in the industry. The Association issues statistical bulletins that everybody in the industry uses—

THE COURT:

All right.

MR. KATZ:

—to show the—

MR. HIRSCH:

May I use this bulletin for the year 1937?

MR. KATZ:

I object to the competency of the testimony, if that is to be used. The issue is the business to be anticipated by this business, and not generally by all other hosiery manufacturers.

THE COURT:

Yes, I am inclined to think so. I think he

can testify, if you want to, that there was nothing in the industry which would indicate a discontinuance of the same rate of business, or a depression, but I don't think that you can put in those figures, because they don't really bear on this particular industry.

BY MR. HIRSCH:

Q. What was the general condition of the hosiery industry in 1937 as compared to other years and as applied to your business?

A. Much better.

Q. Much better?

A. Very greatly improved, in fact.

Q. Greatly improved over 1936?

A. Yes.

Q. And the volume of business which you were doing in 1937 was equal to, higher than, or less than the volume you had been doing in 1936?

A. Higher than 1936.

Q. And the seasons of the year—

BY THE COURT:

Q. That is—wait a minute—the business for the first five months was higher than the comparable five months of '36?

A. Yes, sir.

THE COURT:

All right.

BY MR. HIRSCH:

Q. Now, there are two seasons of the year, are there not? Spring and summer is one, and fall and winter is the other?

A. That is correct.

Q. When do you do your selling—not shipments—selling, for your fall and winter season?

A. Fall and winter season, why, we do that during June and July.

Q. Now, during the year 1937 were you able to accept any business or take any orders during the months of June and July?

A. No.

Q. Why not?

A. Because of the sit-down condition, and the factory closed down, and the demolition of the place.

BY THE COURT:

Q. When did you stop taking orders?

A. Why, we were taking orders up to the last day, of May 6th.

Q. Up to May 6th?

A. I mean, we were filling orders.

Q. Did you stop on May 6th?

A. We couldn't take any more orders, we had to turn everything back.

Q. Yes.

A. So advised our salesmen and all our accounts.

Q. And you took no orders from May 6th to August 19th?

A. No.

BY MR. HIRSCH:

Q. Based on your knowledge of the hosiery industry at large, based on your knowledge of your own business, based on the amount of busi-

ness you did during the first period of January 1st to May 6th, 1936—1937—are you able to form an opinion as to the amount of business you could have secured in the months of June and July for shipment during the last six months of 1937?

A. Yes.

MR. KATZ:

Now, that is objected to—oh, I beg your pardon, I beg your pardon.

THE COURT:

The next question, don't answer.

MR. HIRSCH:

Don't answer the next question.

BY MR. HIRSCH:

Q. What in your opinion would have been the amount of business that you could have secured, in so far as whether it would exceed, equal, or be less than the same rate of business you did during the first four months of the year?

MR. KATZ:

That question is objected to, if Your Honor please. There is no proper foundation, and the opinion of this witness is inadmissible on a question of this kind.

MR. HIRSCH:

He is the most qualified person of all to testify, if Your Honor please. He knows the industry. He was in the business. He knew what he had been doing, and he knows what the situation was in June and July, and I can

think of no one more qualified to say what amount of business he could have done.

THE COURT:

Well, I don't believe that is the way to prove it, though. I think all you want from this witness is that there were no conditions in the industry which indicated that—or, which operated to depress the industry during that period. That is a fact proposition. He can testify to that.

MR. KATZ:

That is right.

THE COURT:

Then the jury forms their own conclusion. I will permit him to be asked that, but I will sustain the objection—

MR. HIRSCH:

All right.

THE COURT:

—as to—

BY MR. HIRSCH:

Q. Based on your statement that the sales for shipment during the last six months of the year are made in June and July, will you tell us whether or not there was any change in the condition of the industry during those months which would have indicated to you, or, which did indicate to you—

THE COURT:

“or which would operate to”.

BY MR. HIRSCH:

Q. —or which would operate to prevent you from having secured business—

THE COURT:

That is it.

BY MR. HIRSCH:

Q. —during those months which would have enabled you to ship during the period, the last period of the year, an amount of hosiery equal to the amount that you did before—

THE COURT:

Oh, you have got the question so long, it is all right where you stopped the first time to take breath, if you had just stopped there the whole thing would have been all right. Now, read the first part of that sentence, Mr. Rodebaugh.

MR. HIRSCH:

I will redraft the question.

THE COURT:

Read the first part. It is all right just as you asked at first, without going into the long statement afterwards.

(The question was repeated by the Reporter, as follows:

“Q. Based on your statement that the sales for shipment during the last six months of the year are made in June and July, will you tell us whether or not there was any change in the condition of the industry during those months which would have indicated to you, or

which did indicate to you or which would operate to prevent you from having secured business—")

BY THE COURT:

Q. —having secured business during that period.

A. No, there was nothing there which would have prevented us securing our business for the balance of the season during that period.

Q. Nothing in the condition of the industry had changed,—

A. No.

Q. —or any special factor operating in the industry?

A. No.

THE COURT:

All right.

BY MR. HIRSCH:

Q. And would the rate of business done by you from May 6th to the end of the year have been the same as that which you did during the first four months, in your opinion, if you had been permitted to operate uninterruptedly?

MR. KATZ:

Objected to.

THE COURT:

Well, that is the same thing. You have met the situation all right. I will sustain the objection. It is a question of the fact testimony, and the jury draws their own conclusions.

MR. HIRSCH:

Read me the question and answer again, please.

(The question was repeated by the Reporter, as follows:

“Q. Based on your statement that the sales for shipment during the last six months of the year are made in June and July, will you tell us whether or not there was any change in the condition of the industry during those months which would have indicated to you, or which did indicate to you. * * * or which would operate to prevent you from having secured business—”

“BY THE COURT:

“Q. —having secured business during that period.”)

MR. HIRSCH:

Well, now, if Your Honor please, I think I must—at least, I desire to go further: not just secure business, but at what rate would you have secured the business. I think is a proper following question. I think the jury would want to know whether he would have got the same amount of business as he formerly enjoyed, less or more.

THE COURT:

Well, he says there was no change in the industry which would have prevented him from securing—

MR. HIRSCH:

What was his answer?

(The answer was repeated by the Reporter, as follows:

"A. No, there was nothing there which would have prevented us securing our business for the balance of the season during that period.")

BY THE COURT:

Q. Well, that is your normal business,—

A. Yes.

Q. —as gauged by the first six months?

A. That is correct.

THE COURT:

Well, all right.

BY MR. HIRSCH:

Q. As gauged by the first four months.

A. Four months—well, even six months, we had sufficient business already booked—

Q. You had some business booked on May 6th?

A. No, we had sufficient business booked in the first six months' period, which carried us along into July—

THE COURT:

Well, I know, but we are talking about four months.

MR. HIRSCH:

Yes, all right.

BY MR. HIRSCH:

Q. Now, was there any change in the price level of goods sold during the months of June and July for shipment during the balance of the year 1937 over the price levels that existed for the same merchandise which you sold during the first four months of 1937?

A. No, there was not. We had went right through with our spring price list into the fall with the same prices.

Q. And was there any—

BY THE COURT:

Q. Was that true of the whole industry at large, the whole hosiery industry?

A. Yes.

Q. What?

A. That is correct, yes.

Q. Yes.

BY MR. HIRSCH:

Q. And in so far as your total costs of producing and selling the merchandise are concerned, would they have been the same, higher, or lower during the last six months as compared with the first six months?

A. They would have been about the same.

Q. There was some increase in labor cost toward the end of the year?

A. That is right, but to offset that there was a reduction in raw material, and especially silk, which is our main proposition, of about twenty cents a pound.

Q. So that the total—

A. It would about average out.

Q. So that your total costs, the costs of producing and selling, would have been the same?

A. That is correct.

Q. And, therefore, whatever profit you made during the first four months would have continued during the balance of the year—

A. Yes, sir.

Q. —if you had been permitted to operate?

A. Yes, sir, absolutely.

Q. And, therefore, just to get a mathematical figure on the record, if the profit, as has been testified to by Mr. Langer, was \$6,111 per week, that would have continued throughout the year?

A. Yes.

MR. KATZ:

Objected to.

THE COURT:

Well, I sustain the objection, but we are all going to make the calculation ourselves. It is a mere matter of form.

BY MR. HIRSCH:

Q. Now, instead of making a profit during the last eight months, what in fact was the result of your business operations for that entire period of May 6th to December 31, 1937?

A. What do you mean, as to loss?

Q. Did you make any money at all?

A. No, no, of course not. In fact, we lost all we made in the first—

Q. Well,—

A. —period, and some.

MR. HIRSCH:

I don't think it is necessary to prove what we lost,—

THE COURT:

No.

MR. HIRSCH:

—just as long as we show there was no profit to offset this calculated profit.

BY THE COURT:

Q. There was no profit, there was a loss?

A. Yes.

Q. The business was conducted at a loss?

A. At a loss, yes.

BY MR. HIRSCH:

Q. Now, Mr. Meyer, as a result of your inability to manufacture and ship merchandise following May 6th, by reason of the sit-down strike, and so forth, damage to the plant, can you tell us whether or not you lost any customers who were previously on your books as regular customers for a considerable period of time prior to May 6th, 1937?

MR. HIRSCH:

Don't answer until Mr. Katz makes his objection.

MR. KATZ:

That is highly objectionable.

MR. HIRSCH:

That goes to the question of good will, sir.

THE COURT:

I think it is extremely speculative. I don't like to inject it into the case. It really would mean, wouldn't it, apart from the question of the speculative feature, wouldn't it mean that counsel would have to go into each particular customer,—

MR. KATZ:

Yes.

THE COURT:

—and the motives that—

MR. KATZ:

That is right.

THE COURT:

—persuaded him to cease doing business?

MR. HIRSCH:

We are prepared to show that.

MR. SIMONS:

If Your Honor please, may I also point out this, that the cases hold you must seek one or the other of the remedies. In no case do they permit both methods of procedure, and it was pointed out in the Sea Green case that they have to prove it by the particular customer, and in that case there was no discussion of profits.

THE COURT:

What was the case you are talking about?

MR. SIMONS:

That is the Sea Green case, 229 Fed. 77.

MR. HIRSCH:

That was a case where they sought loss of profits—

MR. SIMONS:

Now,—

MR. HIRSCH:

—because of cancellation of customers—because of loss of customers. In this case we are merely seeking to show in addition to the loss of profits that we lost customers who were not regained on our books of a very considerable amount, and we will have, of course, to leave it to the jury whether or not that rep-

resented an item of damage for which we can make recovery.

MR. SIMONS:

Well, if Your Honor please, they are asking for that very thing when he says that the business would have continued as it had in the first six months, and those customers, therefore, would have continued buying; therefore, he is asking for that very thing in the element of profits.

THE COURT:

Oh, no.

MR. HIRSCH:

No, I am not.

THE COURT:

This element if it is allowed goes far beyond the period of shut-down, you see.

MR. HIRSCH:

Sure; goes into '38, '39.

THE COURT:

It may be now that they are suffering.

MR. HIRSCH:

That is what we are going to prove.

THE COURT:

There is no question, there is no question about the fact that there is undoubtedly some loss there. The only question is whether it is one of those things that is so highly speculative that it is just not susceptible of proof. I am not ready to say as yet. Suppose we—

MR. HIRSCH:

I would like to produce it, and then you can strike it if you think—

THE COURT:

Well, let's see what the decisions are. Let's recess now and talk it over. It is only five minutes to recess time. It is probably an item of some importance, and I don't question that a shut-down of that kind undoubtedly—everybody knows that—causes loss of customers, but the thing is, can you prove it? Is it more than a guess as to why this, or that, or the other man—

MR. KATZ:

That is right.

THE COURT:

—ceased to do business with this company? That is the difficulty in the thing.

MR. HIRSCH:

Well, Judge, I am perfectly willing that if we cannot prove it to your satisfaction, to the point that it ought to go to the jury, that we will then have to have it removed from the consideration of the jury, but I can't prove it until I have shown the evidence that I have.

THE COURT:

Well, take this situation. Suppose you put a man on the stand, a customer, and he said, "Well, we used to buy Meyer's stockings, but we couldn't get them in this period, and we bought Smith's, and then we found Smith's were so much better than Meyer's that we

stayed with Smith." Now, is Meyer entitled to damages there? Because they might have found that fact out entirely independently—

MR. HIRSCH:

Now, I would say no, but if the testimony is that we have made other satisfactory connections and that they don't want to change—

THE COURT:

I am only pointing that out to illustrate the speculative nature of the evidence that is going to be offered.

MR. HIRSCH:

Well, may I discuss it?

THE COURT:

For instance, "Why didn't you go back to the Apex Hosiery Company?"

"Well, we were better satisfied with the service, and the stockings, and the prices we were getting somewhere else." There are all those items. It might have been that some salesman would have come in and gotten that customer away on May 7th, you can't tell.

MR. HIRSCH:

Well, suppose we discuss it with you for a few minutes.

THE COURT:

Oh, yes. It is a speculative feature that I hesitate about putting in. All right.

(Recess, 12:25 until 2 o'clock P. M.)

After Recess

Present: Counsel as before noted.

Plaintiff's Evidence in Rebuttal (Continued)

WILLIAM MEYER, recalled.

Direct Examination (Continued)

THE COURT:

Go ahead.

MR. HIRSCH:

Based on our conference in chambers, I will ask Mr. Meyer, and then we will raise the issue that way:

BY MR. HIRSCH:

Q. Did you lose any customers as a result of this strike whom you have never been able to regain and whose loss was occasioned directly by reason of the fact that you could not produce and ship for that period that you were closed?

MR. KATZ:

That is objected to, if Your Honor please, as incompetent.

THE COURT:

Of course, the way the question is asked it really begs the question that it can be proved.

[

My point that I referred to in the discussion about this is that while there is undoubtedly some damage there, it is not susceptible of proof to the extent that it won't still remain speculative thereafter.

MR. HIRSCH:

Well, let me raise it by an offer of proof. I offer to prove that we lost certain business which affected our good will, and as to that item I would like to adduce proof at this time.

MR. KATZ:

And I object to that on the ground that it is speculative, contingent, and inadmissible.

THE COURT:

Well, when you add to that that "affected your good will", you don't really add anything to the offer. Then what you are offering to prove is, as I understand it—and if I am not correctly stating it, you tell me—that certain customers during the period when Apex was unable to fill orders went to other manufacturers to fill their requirements, and that after Apex got into a position where they could fill orders these same customers did not come back to them, but remained with other manufacturers as customers of theirs?

MR. HIRSCH:

Yes, I offer to prove that in support of the item of good will.

THE COURT:

Yes. Well, the Court is of the opinion that it introduces an element which is too remote and

speculative. It seems to the Court that it would be practically impossible to show without going into the issues in each particular case, how and why the customers, or for what reason these customers declined to come back or did not come back to Apex. There are so many things involved in it that it all becomes a guess, and I can refer to the general discussion that we had on the record this morning before we adjourned. It would be very difficult to say that the only reason that influenced them was the fact that Apex was unable to fill orders at a certain period. In other words, as was suggested, it may have been that the new connections they made were more satisfactory. It may have been that they would have been made anyhow. We all know that there is keen competition among manufacturers. Salesmen of these other competitors may have reached them regardless of whether Apex was filling their orders or not, and may have been able to get them away. The fact that Apex subsequently became a closed shop may have had something to do with it. It may have been something in the quality of the goods themselves. It may have been a matter of price. It may have been a matter of what we generally call service, advertising, all those elements come in, and I do not think it would be possible for the jury to say how long or for what period the shut-down was responsible for loss of business of that kind, and, therefore, I will sustain the objection.

BY MR. HIRSCH:

Q. Now, Mr. Meyer, you testified that the busi-

ness which you take for shipment during the last half of a year is taken during June and July. As a result of your being unable to accept or book any business during June and July of 1937 did that put you out of the market completely for the balance of the year?

A. Yes, with the exception of just a little "spot" business.

Q. And in other years would you book your last half of the year's shipments in June and July?

A. Yes.

Q. And in other years would you only have a very small amount of "spot" business?

A. Yes.

Q. Will you tell us something about the nature of your clientele in so far as this booking ahead is concerned, the method, the basis on which your business has been built?

A. Well, we do our business all on a wholesale basis, dealing principally with jobbers and other manufacturers, and branded line people, and they place their business in bulk for delivery over the advance period designated for the months in the following season, and the main reason for doing that is because of the price guaranteed, the responsibility of our company, the flexibility of making merchandise, and the right to service them in the proper way and take care of the details, and also to make goods according to their specifications all the way through.

Q. And that is the method of the conduct of your business?

A. Yes.

Q. And the basis upon which it has been built?

A. Yes. And then, of course, by placing this busi-

ness in advance, they don't have to worry about the color change or a different season proposition, because we will dye in any given color they want, any shade, any time they want. In other words, we give wide service and put them in a position where they feel absolutely at ease and feel safe to buy merchandise into the future.

Q. Now, do you have a large or small clientele, and is that an oft-changing one or a constant one?

A. Why, our customers are remarkably small for the size of business we do.

Q. Small in number, you mean?

A. Small in number. I don't think at any time we have more than about—well, I mean, at the extreme we have less than a hundred customers on our books.

Q. And are they constant in their—

A. Constant, yes, sir, because, as I say, we build up merchandise for specifications which go out into the branded fields and the different fields, and the merchandise must always be of the same material, and invariably these people will not change unless they are forced to change, because they feel the assurance that they must send out uniform merchandise to their consumers.

Q. And in 1937, when you were unable to take any orders from those customers during the months of June and July for shipment over the balance of the year did they place their orders and business elsewhere?

A. Yes, they did.

Q. And were you able to hold those orders during the year of 1937, or did you lose them all?

MR. KATZ:

I object to that.

THE COURT:

This is a little different. This is not a question of their not returning. This is a question of their—as I understand you—orders that normally would be placed during the months of June and July.

MR. KATZ:

Oh, it is limited—

THE COURT:

Or, May 6th to August 19th.

BY THE COURT:

Q. That is what we are talking about, isn't it?

A. No, I am talking about the fall season.

Q. No, what I want to do is confine this to the orders that normally would have been placed during the period from May 6th to August 19th.

A. Well, in that June and July period, they would naturally place orders during that period and all the way up to the end of the year.

Q. Yes.

BY MR. HIRSCH:

Q. For shipment, you mean, to the end of the year?

A. That is right.

BY THE COURT:

Q. But the orders would be placed largely during that period?

A. During June and July.

Q. Yes.

BY MR. HIRSCH:

Q. And when you were unable to accept their orders you didn't receive them either for shipment during that year?

A. Yes, after you miss the boat, it is over. I mean, they have to place their orders.

MR. HIRSCH:

Cross examine.

A. (Continued) You could only get small filling orders.

Cross Examination

BY MR. KATZ:

Q. Mr. Meyer, you manufacture a non-branded product, don't you?

A. Yes, as I explained to you, we manufacture for the wholesale trade.

Q. Yes.

A. And for the various brands that exist in the United States.

Q. It is a non-branded product; there is no branded name?

A. They aren't named. When I ship them out, the brands are put on there—

BY THE COURT:

Q. Well, do you make—

A. —they aren't personally branded.

Q. That is what I mean, they aren't identified as your manufacture?

A. Well, with small exceptions.

Q. Small exceptions?

A. Yes.

BY MR. KATZ:

Q. Now, you are a member of the Full-Fashioned Hosiery Manufacturers of America, Inc., isn't that correct?

A. Yes, since I signed the agreement with the union.

Q. That is right. Now, that is an entirely different organization of hosiery manufacturers, isn't it?

A. In what respect?

Q. It differs from the National Association of Hosiery Manufacturers, and it differs from the association of which you were a member prior to the strike?

A. Well, the only difference I would know of, that they act under contractual relations with the union.

BY THE COURT:

Q. Well, but it is not—that body that he mentions is not any of the bodies that have been already mentioned?

A. Oh, no, that has not been mentioned as far as I know.

THE COURT:

All right.

BY MR. KATZ:

Q. Mr. Meyer, that association of hosiery manufacturers is the collective bargaining agency on behalf of all of its members, including the Apex Hosiery Company, isn't it?

A. Under contract, yes.

Q. And they have rules and by-laws too, don't they?

A. Yes.

Q. And under the rules and by-laws you authorize and delegate them to bargain with the union on wages, rates and working conditions?

A. That is correct.

Q. Now, during the month of December, 1937, did the Full-Fashioned Hosiery Manufacturers of America, Incorporated, of which you were a member, present a claim to the union for a reduction in wages?

A. Yes, they did.

Q. And did they base that claim upon the fact that during the last six months of the year 1937 there had been a precipitous drop in business amongst their members?

A. That may be true, but that didn't affect us.

Q. You are a member of that association?

A. Yes, I am a new member of that association.

Q. At that time you were a member of it, is that correct?

A. When was this?

Q. When this claim was made.

BY THE COURT:

Q. December, say, along in December of 1937.

A. Yes, since I signed the union—the contract with the union.

BY MR. KATZ:

Q. Subsequently there was a hearing before a wage rate tribunal, wasn't there, Mr. Meyer?

A. Yes, right.

Q. Did you participate in the presentation of testimony before that wage rate tribunal?

A. I think I was present, yes.

Q. Yes. Now, I show you a document and ask you whether you ever saw that.

(Brief on Behalf of the Full-Fashioned Hosiery Manufacturers of America, Inc., was shown to the witness.)

A. Yes.

BY MR. KATZ:

Q. Yes, and that is the brief, is it not, which was submitted to the wage rate tribunal under the union contract?

A. Yes.

Q. In an effort by the association to obtain for and on behalf of its members a reduction in wage rates.

MR. HIRSCH:

Submitted when, Mr. Katz?

MR. KATZ:

Submitted to the wage rate tribunal in February, 1938.

A. That is right.

BY MR. KATZ:

Q. That is right, and I was a member of the tribunal, wasn't I?

A. Yes.

Q. Yes. Now, I refer you to page 18 of this document and ask you to explain that chart—or, tell us, first, what the chart is.

MR. HIRSCH:

I object to this witness being asked a question on anything in connection with any brief

that was presented to any wage tribunal unless it is shown that he prepared it; and, secondly, I object to it unless it is shown that it in any way affected his business. His testimony was that this in no way affected his business.

THE COURT:

Well, I know that, but that is a matter for the jury to say. I will overrule the objection. It appears that he was a member of the association and was present and testified.

BY THE COURT:

Q. Is that correct?

MR. KATZ:

Participated, he said.

A. Participated.

BY THE COURT:

Q. Participated; and the brief was filed in behalf of you as well as the other members of the association? You didn't dissent from anything in the brief, did you?

A. Yes, I did.

Q. What did you dissent from?

A. Well, I mean, there was quite a discussion on the brief prior to it being submitted.

Q. But it was submitted. Did you dissent before the tribunal?

A. No, no.

Q. All right.

A. I was also present—

MR. HIRSCH:

I object to this witness being asked a question on that brief,—

THE COURT:

It is proper cross examination, I think.

MR. HIRSCH:

—unless—

THE COURT:

No, I will permit it.

MR. HIRSCH:

All right.

THE WITNESS:

Well, this here is a chart—

MR. HIRSCH:

May I see what you are showing him? I haven't seen it.

MR. KATZ:

Yes, I am sorry. I don't have another copy.

(The brief was shown to Mr. Hirsch.)

BY THE COURT:

Q. While you are waiting, can you give me a list or a statement of the orders placed or taken by Apex from August 19th up to December 31st? It is not in evidence.

MR. KATZ:

No.

BY THE COURT:

Q. Now, you can give me that, can't you?

A. Yes, I can about tell you what that is. I think the orders taken amount to about one hundred and seventy-five thousand dozen of goods, if I remember.

BY MR. KATZ:

Q. Didn't you do over a million and a half—

A. Well, we had some back orders—

MR. HIRSCH:

We can give it to you.

THE WITNESS:

Yes—one hundred and twenty-five thousand.

THE COURT:

Let me have a month by month statement of orders taken by Apex from August 19th to December 31st, just in dollars, I think would be best—well, dollars and dozens. I guess it is easy to give us both.

BY THE COURT:

Q. What is the total capacity of your plant when it is running—suppose you have all the orders you could possibly fill, what would you turn out in a month?

A. Over a hundred thousand dozen of goods.

Q. A month?

A. A month, yes, sir.

Q. Go ahead.

A. One hundred and five; it depends, you know, it all depends on the days of the month.

Q. Well, one hundred to one hundred and five is near enough, isn't it?

A. Oh, yes.

BY MR. KATZ:

Q. Well, all right, to hasten the examination, Mr.

Meyer, this chart was prepared by your association for submission, and you are now proceeding to explain the meaning of it.

A. It says "Percentage of increase or decrease in shipments during each month of 1937 with respect to corresponding month of 1936."; this chart, compiled from information obtained from statistical bulletins relating to women's full fashioned silk hosiery, issued by the National Association of Hosiery Manufacturers.

Q. Yes, and it compares the two years, doesn't it?

A. Yes, I think—now, wait a minute, where is that?

Q. Here (indicating).

A. Yes.

Q. Yes. Now, this reflects shipments, doesn't it?

A. That is what it says, yes.

Q. Now, when they say that in February, 1937, shipments were approximately thirty-one per cent more than it was in the month of February, 1936, that would refer to orders taken during what period of time?

A. Those goods were—those goods were taken along about November, December, I imagine, of the year previous, for delivery in the future.

Q. I see.

A. I mean, that would apply in our case.

Q. That is right. Now, when it shows—when it shows shipments during the month of May and June, 1937—and that is an increase over 1936 of ten to twenty per cent—those orders were taken when?

A. In our case they would have been taken—

Q. Would have been taken at what period?

A. —before the end of the year for the spring season.

Q. That would still be orders taken about five or six months prior—

A. That is about right.

Q. —to the date of shipment?

A. That is about right.

Q. Now, merchandise that is ordered during the months of June and July would, therefore, be delivered during the months, I assume, of October, November, or December?

A. That is right.

Q. That is correct?

A. Well, I mean during that fall period.

Q. Now, this chart shows a precipitous drop starting with the month of June from a high of twenty-one per cent to a low at the end of July of about three per cent over 1936, is that correct?

A. That is what this chart shows, yes.

Q. And from then on it drops, and about the middle of October it goes below 1936, until at the end of the year it hits sixteen per cent below—

A. Yes.

Q. —the business done in the comparable period of time during the year 1936, is that correct?

A. That is what it shows here.

Q. Now, that business of shipments during that time would reflect orders taken during what months?

A. What periods is that you are speaking about?

Q. This dropping period.

A. This June and July business?

Q. No, the shipments of the latter part of the year,—

A. Well,—

Q. —fall and winter.

A. Well, they would be taken in June and July.

Q. June and July?

A. Right.

Q. So that this chart shows that business was not taken during June and July in the same amount as it was taken in June and July of the preceding year?

A. Well, this only talks about shipments in—

BY THE COURT:

Q. No, no, but you see, that is just what he is making out. Let me show you. Doesn't the fact that the shipments dropped below 1936, the shipments of October, November and December,—

A. Yes.

Q. —doesn't that indicate that the orders of June and July had already dropped below 1936 orders?

MR. KATZ:

That is correct.

BY THE COURT:

Q. Isn't that what—

A. June and July orders—well, of course, June and July, that is when I—it was impossible for me to take business.

Q. Oh, I understand, but we are only talking about what that chart shows.

A. Oh, I see.

Q. Doesn't that indicate to you—

A. It shows here there was a drop in shipments, yes, sir.

Q. Doesn't it also follow from that chart there was a drop in orders in June and July,—

A. Not necessarily.

Q. —because these shipments were on June and July orders?

A. Not necessarily.

Q. I thought you just said the ordinary course of business was that the orders delivered in October, November and December—

MR. HIRSCH:

Your Honor, that is the way he does business. He doesn't say that is the way everybody does business. I would like you to ask him.

MR. KATZ:

Certainly, ask him.

BY THE COURT:

Q. You explain that.

A. The difference is, we take our business for the period, the spring period, which carries us all the way to June 30th.

Q. Yes.

A. We take that business in along November and December,—

Q. Yes.

A. —see? And then we take our fall business in June and July, which carries us all the way into December 31st.

Q. All right, now, that I understand.

A. Yes.

Q. Don't other people do the same thing?

A. I don't know—no, some of them do "spot" business.

Q. Well, don't most manufacturers do the same as you do?

A. I wouldn't say that.

Q. Wouldn't say that?

A. No.

BY MR. KATZ:

Q. Mr. Meyer, is it not a fact that the union agreement with the association expires on September 1st of each and every year prior to this contract, or expired on September 1st of each and every year—

A. Well,—

Q. —prior to the current agreement?

A. —under this contract, under this here period that you are speaking about,—

Q. Yes.

A. —is the contract which I had made with the —where Mr. McGraa, and the union, which wasn't the regular contract of the association,—

Q. You know—

A. —but to be able to get the—

Q. Excuse me,—

A. —the arbitration machinery, I was advised that it would be advisable for me to join the association.

BY THE COURT:

Q. Now, listen,—

MR. KATZ:

That is not the question.

BY THE COURT:

Q. —that is not it. Now, let me ask you this question. Take that chart.

A. Well, that chart—

Q. Just wait a minute. Let me put this question. Give him the chart.

Now, suppose you had never been in contact with statistics, or the National Association, or anything else, but you had been a hosiery manufacturer, and hadn't read the papers, or anything, you know your business and all that, and I gave you that chart, and suppose I said to you, "Now, Mr. Meyer, does that indicate or doesn't it that there was a drop in orders in June and July?" What would you have said?

A. According to this chart, yes, sir.

Q. Yes, that is what I thought.

A. Yes, sir, because it shows a very definite—

Q. It shows a drop in shipments in December and November, and wouldn't that indicate a drop in orders in June and July?

A. Well,—

Q. I mean, assuming you didn't know anything about other peoples' business?

A. That is right.

THE COURT:

All right. Now, that is where we are at.

BY MR. KATZ:

Q. Now, I show you another document.

MR. KATZ:

Will you mark this for identification?

(Chart on page 18 of brief on behalf of the Full-Fashioned Hosiery Manufacturers of America Inc., in a proceeding before a Wage Rate Tribunal in the matter of Full-Fashioned Hosiery Manufacturers of America, Inc., and American Federation of Full-Fashioned Hosiery Workers, was marked Exhibit D-10.)

THE COURT:

Do you want to show that to the jury?

MR. KATZ:

Yes, sir, I should like to mark it for identification, first.

(Exhibit D-10 for identification was shown to the jury.)

THE COURT:

You see, members of the jury, that does not indicate—don't get the wrong idea about that—that that is the absolute amount of orders. That indicates the difference between '37 and '36, and where it is high the line means that '37 was running ahead of '36, and where it gets right on that cross line it means '37 was exactly the same. When it gets below it means the '37 business for that period was below the '36 business.

MR. HIRSCH:

Of course, Your Honor precluded my examination of Mr. Constantine on that point, and I suppose you are now going to permit me to bring him into the picture.

THE COURT:

Well, now, wait until it comes up.

MR. HIRSCH:

I mean, on the statistical end of this entire thing.

THE COURT:

Well, I know, but I can't rule on matters that are not before me.

MR. HIRSCH:

All right.

THE COURT:

That is for you to say when it comes up. This is quite a different proposition. This is cross examination.

MR. KATZ:

That is right.

MR. HIRSCH:

All right, I have no objection to that; I mean, from the standpoint of proving all these figures.

BY MR. KATZ:

Q. What is this paper?

(Special News Letter of the National Association of Hosiery Manufacturers for December 29, 1937, entitled "Exit 1937" was shown to the witness.)

A. This is, a Special News Letter furnished by the National Association of Hosiery Manufacturers.

BY MR. KATZ:

Q. And this—

A. It says "Exit 1937".

Q. Yes, and this Special News Letter is sent out by the National Association at various times in addition to their monthly bulletin, is that correct?

A. No—monthly bulletin?

Q. Don't they have a monthly bulletin at the same time?

A. I wouldn't call it a monthly bulletin. I think it is statistical reports that come out.

Q. All right, statistical reports. They are highly reliable, aren't they?

MR. HIRSCH:

May I see that, please?

A. Yes.

BY MR. KATZ:

Q. We all agree they are reliable?

A. Yes, sir, everybody uses those figures.

Q. Everybody uses them?

MR. HIRSCH:

Well, I will object to this bulletin unless it is shown that it is limited to the full fashioned hosiery industry, since the association is composed of both full fashioned and seamless.

THE COURT:

It is not offered in evidence.

MR. KATZ:

It is not offered in evidence.

THE COURT:

It is simply offered for cross examination. The witness looks at it, knows what it is, and says it is highly reliable. It has not been offered in evidence yet.

MR. KATZ:

No.

THE COURT:

I don't know what question is going to be based on it. He can show him anything he wants. He can show him a full fashioned stocking and base a question on it if he wants to.

BY MR. KATZ:

Q. Now, this Special News Letter is captioned "Exit 1937", isn't it?

A. Yes.

Q. And there is certain printed matter therein referring to business during 1937, isn't there?

A. I think so. I haven't read it yet.

Q. Have you ever read this bulletin?

A. Oh, yes, I look at it right along, whenever I get the opportunity.

Q. I ask you—

A. Sometimes I miss a few of them.

Q. I ask you to read the third paragraph.

A. The third?

Q. Yes, not out loud; read it to yourself.

A. Oh, I see.

THE COURT:

You can read it yourself.

(The witness examined the document.)

BY MR. KATZ:

Q. All right, you have read it?

A. Yes.

Q. Now, I ask you whether it is not a fact that business during the latter half of the year 1937 in full fashioned women's hosiery did not decrease amongst the manufacturers who were members of the Full Fashioned Hosiery Manufacturers of America.

A. Oh, that I couldn't answer.

Q. You couldn't answer that?

A. I don't know. I don't know what their business was.

Q. You were present at the wage tribunal hearings, weren't you?

A. Yes—well, individually, I don't know what—

Q. Didn't you speak to me personally and say to me that unless you received a wage reduction which would give you at least fifty cents per dozen that you couldn't get orders.

MR. HIRSCH:

Wait a minute, this was in February, 1938?

BY MR. KATZ:

Q. Did you say that to me in February, 1938?

MR. HIRSCH:

All right, that—

A. Yes, I said that, and the reason I said that to you was because of the change in brackets of prices, where the branded lines had to come down to seventy-nine cents to meet a new—a new bracket which had the merchandise started to slip in on the last part of the year, to go into that bracket, and we were very much concerned, because on the wages and the basis on which we were operating, we couldn't meet that bracket.

BY MR. KATZ:

Q. Didn't you say in response to Mr. Hirsch's question that the wage increase that you granted in July of 1937 did not affect your condition because it was taken up by the increase—by the decreased cost in silk?

MR. HIRSCH:

In 1937.

A. That is correct, in my selling prices.

BY MR. KATZ:

Q. That is right?

A. In my selling prices.

Q. That is right, and aren't you in direct competition with other manufacturers?

A. Yes. This condition which you speak about occurred on the end of the year.

Q. The chart doesn't say that, does it?

A. Not that chart.

Q. No.

A. But we have—

THE COURT:

He is speaking of a price condition, now.

MR. KATZ:

Yes, I know.

THE WITNESS:

Because we had to put ourselves—we were selling goods, our 1937 line showed our lowest price goods we were selling, I believe that price was \$5.75, and from that time on we have tried to maintain a \$5.25 price to meet that six-dollar competition of the branded lines and meet the seventy-nine cent retail selling price over the counter.

BY MR. KATZ:

Q. Didn't you also have to meet the competition from the Southern manufacturers who were selling merchandise such as you manufacture?

A. They were the ones, I believe, and certain sections of Pennsylvania, were responsible for breaking up in that new bracket.

BY MR. HIRSCH:

Q. Was this in 1938?

MR. KATZ:

1937.

BY MR. HIRSCH:

Q. When in 1937?

A. This is toward the very latter part of 1937, I mean in December, I think it was.

BY MR. KATZ:

Q. Is it not a fact, Mr. Meyer,—

THE COURT:

Is the jury through with the chart?

JUROR NO. 8:

May I ask a question?

THE COURT:

Yes.

JUROR NO. 8:

This drop-off in business here, how many of the mills had sit-down strikes that would keep them from—or, had strikes that would keep them from taking orders to deliver, or would cause those shipments to come down?

THE COURT:

Can anybody answer the question?

MR. HIRSCH:

Leader answered it by saying twenty-two had sit-down strikes, and I don't know how many more there were.

JUROR NO. 8:

Wouldn't that have something to do with the shipments, if other mills had strikes, that would keep them from shipping out their goods?

THE COURT:

That is a proper question to ask.

BY MR. KATZ:

Q. Do you want to answer the question, Mr. Meyer?

A. Naturally, you couldn't ship goods with your factories closed down and damaged and everything.

Q. Were there any sit-downs—

A. And I would say it wasn't only a question here, in Philadelphia, it was also a question of elsewhere in Pennsylvania, where mills were suffering under difficulties of labor troubles.

Q. Yes.

A. One of the biggest operators we have up in the Reading district, oh, I believe delivers at least—well, I would say three times as much merchandise as I do.

Q. Yes, they do, but they didn't stop production, did they?

A. Well, I suppose they were handicapped somewhat.

Q. You know very well, Mr. Meyer, that that strike there was unsuccessful, and we didn't stop a wheel there, you know that?

A. I don't know that.

Q. You don't know Berkshire Knitting Mills business conditions during the period of the strike?

A. I don't know what they were delivering.

Q. When did the strike at Berkshire start?

A. I think in '36, already.

Q. Was that October 1st, 1936?

A. I think in 1936.

Q. Was that strike over by January 1st, 1936?

A. Not to my knowledge.

Q. 1937; not to your knowledge?

A. No, I don't—I don't know whether the strike is over or not. I understand the National Labor Board, the question is still up before them for something. I don't know,—

Q. Well, that is immaterial.

A. Well, I don't know what the fact is.

Q. But you know as a fact that there was no strike there after January 1st, 1937?

A. That I don't know.

Q. You don't? Where else were there any strikes that you know of which may have changed the picture or explained the picture of the chart in accordance with the juror's question?

A. Well, I am only trying to explain it to the best of my ability, and which you should know just as well as I do.

Q. I can't testify, Mr. Meyer.

A. Excuse me. The situation up in the Reading district, where quite a few mills were affected, and I think their situation wasn't settled until along about the end of March, or somewhere in that period, from the first of the year, on.

Q. Yes, that strike began during the second or third month of 1937, and was ended in thirty days, wasn't it?

A. It began—

Q. Very short situation, wasn't it?

A. I think it started some time right after the

first of the year, as far as I can remember, and settled about the end of March.

Q. So that feature was not effective on shipments as a result of strikes in Reading. That would be—that would have occurred prior to the drop beginning at the end of June, 1937.

A. Well, do you—do you have in mind for a moment that if you have a labor difficulty in your factory that the moment you decide the strike is off, everything runs one hundred per cent? It takes a long while to get your organization back in shape and get your production functioning, even without damage.

Q. In your case—

A. Even without damaging machinery.

Q. I am referring now to the Reading situation—

A. Anybody.

Q. —which you referred to.

A. Anybody.

Q. You know the Nolde and Horst Company very well, don't you, Mr. Meyer?

A. Yes, I do.

Q. You do business with them?

A. Yes, they—well, they buy merchandise from us.

Q. And they are a very large operator in the Reading area, aren't they?

A. One of the largest. I don't say they are the largest.

Q. One of the largest?

A. Yes.

Q. And did they stop shipments during the month of March or April or June, 1937?

A. No, I think their labor difficulties were over at that time.

Q. Certainly they were over.

A. Yes, but they hadn't been able to place business, run their factories and put their merchandise in stock—

Q. How do you know that?

A. —so they could ship it during those months.

Q. How do you know that?

A. Because they told me so.

Q. Who told you that?

A. Why, they told me they weren't operating, their plant was closed. They had a sit-down strike.

I mean, I can make that deduction.

Q. You make a lot of deductions.

A. Yes, sure.

Q. Did he tell you also he went into operations as soon as the contract was signed?

A. He told me, yes, he went back into operation.

Q. Certainly, and the whole Reading situation was cleaned up long before June, 1937, wasn't it?

A. I would say so, yes.

Q. Certainly.

A. In March.

Q. To your knowledge, were there any strikes in the latter part of 1937 which would affect this chart?

A. Well, now, wait a minute, I am just not versed on that whole period of 1937, but I think there was labor difficulties in the full fashioned end during that entire period of 1937.

Q. As a matter of fact, Mr. Meyer, the industry as a whole can produce more than is shipped, isn't that so?

A. I think most every industry here—

Q. I am asking you about the full fashioned hosiery.

A. Yes, I think so.

Q. What is the productive capacity of the machinery in the country, do you know that?

A. Well, approximately, yes.

Q. What is the figure?

A. Depending on what kind of merchandise is requested and wanted, if—taking production as a whole,—

Q. Yes.

A. —I presume that the potential production of the industry would be about—oh, around forty-eight million dozens of ladies full fashioned hosiery.

Q. Yes, and about how much is shipped, what percentage of that is actually—

A. Well,—

Q. —manufactured and shipped?

A. —our records show for last year—I just don't remember, I think it is forty-two million.

Q. There is a spread there for productive capacity, isn't there?

A. Yes, but don't forget that the potential production is figured on everything operating full-time.

Q. That is correct.

A. Which, of course, you have to make certain deductions, so you can't make—

Q. That is correct, so if one plant is shut down the customer can buy it elsewhere, can't he?

A. Oh, I don't think there is any shortage of merchandise.

Q. That is right.

A. I didn't see anybody going barefooted.

Q. So that regardless of whether or not there were strikes here and there, the shipments as a whole, or the orders as a whole could have been placed at some point amongst all the manufacturers in the industry?

A. Depending on what kind of merchandise they wanted.

Q. That is correct, they would give specifications?

A. Yes, but there is certain other merchandise that they couldn't get if certain manufacturers were affected.

Q. What do you mean by that?

A. Well, you take, for instance, the non-run situation. They can't get that anywhere else.

Q. About how much of the industry produces non-run, and how much non-run is sold?

A. Makes no difference; they take all that can be produced.

Q. Yes, will you give us about how much?

A. Well, I could only estimate it. I would say the production of non-run hosiery would be—monthly basis?

THE COURT:

No; annual basis.

BY MR. KATZ:

Q. Annual basis.

THE COURT:

So as to compare it with the whole forty-eight—

A. Well, I am producing on an annual basis of that class merchandise about twenty thousand dozen a month.

BY MR. KATZ:

Q. What percentage of your annual production is twenty thousand a month?

A. Well, you could take it on a monthly basis of about one hundred thousand dozen.

Q. It is twenty per cent?

A. But it is taking up all the equipment, the available equipment, in the country.

Q. That is right.

A. Of that class of merchandise.

Q. That is right. Now, Mr. Meyer, was it not a fact that your cost of production was increased during the latter part of the year 1937?

MR. HIRSCH:

Total cost?

MR. KATZ:

Total cost of production.

A. I would say it was about even.

BY MR. KATZ:

Q. About even?

A. Yes.

Q. Does it make—

A. One offset the other, as I explained to you.

Q. That is, the reduction in the cost of silk—

A. Yes.

Q. —overbalanced the increase—

A. No, just—offset it.

Q. Offset the increase in labor rates, is that correct?

A. In the prevailing rates that existed at that time.

Q. Yes. Didn't you also have another condition in your plant, namely, the shift from the single machine system—from the double machine system to the single machine system, which would have increased your cost of production per dozen?

A. No.

Q. No?

A. No, I don't think so.

Q. Does it cost—

A. I don't know the exact figure there, but I am most certain that it did not. In fact, if anything, I think it did the opposite.

Q. You mean the single machine system—

A. Yes.

Q. —is cheaper—

A. Yes.

Q. —than the double machine system?

A. Yes, because I was running a two machine job, with one knitter and two helpers.

Q. That is right.

A. And then, of course, by running a single job I eliminated one man in there.

Q. That is right, and when you went to the single machine system you gave some helpers machines?

A. Yes, part machines, and some helpers today are still running half machines.

Q. That is right.

A. And so forth.

Q. Did you get full production from such machines which were being operated by the helpers?

A. No, not right away.

Q. Not right away?

A. But gradually they developed.

Q. About how long a time did it take?

A. Well, I think Mr. Struve is in better position to answer that than I am.

Q. Would that account for the deficiency in operation which Mr. Langer referred to?

A. No, I don't think so. I think the deficiency was due to getting started, to getting out equipment going.

Q. And this had no effect on it at all?

A. I don't—well, I couldn't say that. You would have to ask Mr. Struve. He follows that.

Q. Now, when you take orders from your customers you manufacture against those orders in the greige, don't you?

A. That is correct.

Q. And then you deliver on call?

A. That is—well, with the specified delivery date on the order.

Q. Yes, and are those orders subject to cancellation?

A. No.

Q. No?

A. No, not as long as I live up to my end of the proposition.

Q. Yes.

A. I mean, we have a regular order form, which is a bona fide order.

Q. And are those orders subject to readjustment in price?

A. No.

Q. They are not?

A. No, No, the only time we get any readjustment in price was when we had these different taxes, and so forth, that came in.

Q. Yes.

A. Of when we had specified at the time we sold that if that would take place, why, we would have to revise our prices.

Q. Now, as a matter of fact, you did do business of approximately one million and a half during the last eight months of 1937, didn't you?

A. That is right.

Q. You produced and sold one million, five hundred and seventy-five thousand dozen, two hundred and fifty-two.

MR. HIRSCH:

I won't object to the question because he said "you produced and sold." We sold that much, but some of it was already produced. Well, it doesn't matter.

MR. KATZ:

Doesn't matter.

A. Yes.

MR. HIRSCH:

We had some orders on hand, as the testimony indicated, on May 6th which were canceled, some which were not, and they went into the final figure.

BY MR. KATZ:

Q. And then you did manufacture against orders which you had on hand or took,—

A. That is right.

Q. —and the sales amounted to \$1,575,252.16?

A. That is right.

Q. That is correct. How does that compare with the last six months of 1936?

A. May I look at the record? I mean, if you want me to answer it.

Q. Don't you know?

A. Not offhand.

MR. HIRSCH:

If Your Honor please,—

BY MR. KATZ:

Q. I was assuming you were the expert—

A. I can tell you, though,—

MR. HIRSCH:

If Your Honor please, this period is from May 6th.

MR. KATZ:

I will withdraw the question. Withdraw the question.

MR. HIRSCH:

I would like you to compare it, but compare it for the period of May 6th, until December 31st, and then ask him how it compares.

BY MR. KATZ:

Q. You did manufacture during the last eight months of 1937 275,791 dozen pairs of stockings, didn't you?

MR. HIRSCH:

That is objected to. That was the amount that was shipped, sold and shipped.

THE WITNESS:

That is right, that was shipped.

MR. HIRSCH:

That was shipped.

THE COURT:

How much?

MR. KATZ:

275,—

THE WITNESS:

Whatever that figure is.

MR. KATZ:

—791. That was shipped.

THE COURT:

How much, please?

MR. KATZ:

275,791 dozen pairs shipped—

THE WITNESS:

That is right.

MR. KATZ:

—in the latter part of the year.

THE WITNESS:

That is right.

THE COURT:

In the last eight months?

MR. HIRSCH:

Yes, in the whole period.

THE WITNESS: In the whole period.

BY THE COURT:

Q. From May 6th to the end of the year?

A. Yes, sir.

BY MR. KATZ:

Q. When you entered into the agreement with the union on July 29th, 1937, did you go about getting business at that time?

A. July? I was trying to get business during the entire period. During that entire period I kept contact with my people as much as I could, customers.

Q. You did attempt to get business during June and July, 1937?

A. What is this? No, I told them of my predicament, so as to ask them to try to save some of that business—

Q. I didn't ask that, Mr. Meyer. Did you or did you not attempt to get business during the months of June and July, 1937?

A. No, I couldn't get no business during June and July.

Q. Did you start looking for business after July 29th, 1937?

A. Yes.

Q. You did?

A. Yes, sure.

BY MR. HIRSCH:

Q. How soon afterward?

A. Oh, I—we started right in there in August, from August, on, we tried to get business to keep on going, to fill out the period.

BY MR. KATZ:

Q. That is correct. Now, it doesn't necessarily follow—I beg your pardon, I withdraw that. So

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you tried to get business starting with August, 1937?

A. Yes, as soon as we had the agreement signed.

Q. As soon as you had the agreement, you went out to get business?

A. That is right.

MR. KATZ:

That is all.

Redirect Examination

MR. HIRSCH:

Just permit me to look at this for a second, indulge me, sir.

BY MR. HIRSCH:

Q. This brief that was filed was a brief requesting a reduction in the rates during the year 1938, wasn't it?

A. Yes, sir.

Q. It had nothing to do with 1937 in so far as rates were concerned?

A. No, nothing.

Q. And I want to ask you the direct question—

BY THE COURT:

Q. Let me ask one general question, Mr. Meyer. I don't question the—wasn't that brief intended to convince the tribunal that business was getting worse during the latter part of 1937?

A. During the later months of 1937, that is right.

Q. It was filed for that purpose?

A. Due to the fact—due to the fact that this new price bracket element had crept into the—

Q. Yes, but that chart has nothing to do with prices at all. Wasn't that chart put there to convince the tribunal that had to pass on this that business wasn't as good as it had been? Wasn't that the purpose of that thing?

A. Yes, I would say so.

Q. Surely, it was.

BY MR. HIRSCH:

Q. Now, Mr. Meyer, assuming that you had been able to take your orders in June and July for shipment during the last half of the year of 1937, would the fact that there was any recession in business generally in the hosiery industry during the later months of 1937 in any way have affected your orders taken in June and July of 1937?

A. They would not. It would not.

Q. Those orders would have been filed at the prices for which they had been taken?

A. Were taken at, absolutely.

THE COURT:

Now, let me ask Mr. Meyer a question or two, also.

BY THE COURT:

Q. Now, you have a second season—we will say that the selling peak—that a selling peak comes in June and July, that is right?

A. Yes.

Q. That I understand.

A. Yes.

Q. Now, there is a second season somewhere, and a second selling peak during the year?

A. The November-December period, and that is when we got the reaction that we were in trouble.

Q. November and December?

A. November and December is when we go out to get our spring business.

BY MR. HIRSCH:

Q. Spring of the following year?

A. Spring of the following year, and that is when we realized that this new price bracket had crept in and we couldn't meet that proposition and we must have reductions to be able to meet that seventy-nine-cent price bracket.

BY THE COURT:

Q. That is normally your second selling peak?

A. That would take us all the way up to June of the following year.

Q. That you call November and December?

A. November and December we book business.

Q. All right.

A. Of course, it is possible to take some up to the middle of January, yet.

Q. That may be called a second selling peak?

A. That is right.

Q. Now, during those two months of November and December there was nothing about the condition of your plant that prevented you trying to get all the business-you possibly could, was there?

A. That is right.

Q. During that period—

A. That is right, yes, sir.

Q. —you were in position—

A. To take the business.

Q. —to take every order that was given?

A. Yes, sir.

BY MR. HIRSCH:

Q. But would those orders which you took in November and December have been for shipment in November and December?

THE COURT:

Oh, I understand that.

A. Only the following year.

THE COURT:

I understand that.

BY MR. HIRSCH:

Q. So that would in no way have affected your business for 1937 either one way or the other?

A. That is right.

Q. In other words, if business had been good in November and December, it would not have helped 1937 shipments, and if it was bad it would not affect it?

A. No.

THE COURT:

Oh, we understand that, surely.

Recross Examination

BY MR. KATZ:

Q. Just one question: but this chart does show that for the members of the association during the months of June and July they could not get the business that they got for the preceding six months?

A. What was that?

MR. KATZ:

Read the question.

THE COURT:

He answered that already?

MR. KATZ:

He answered?

THE WITNESS:

Yes, I said during that period we couldn't get the business for the preceding six months.

THE COURT:

Yes, he answered that. The chart shows that, whatever the cause was.

MR. KATZ:

Will you permit this chart to go in?

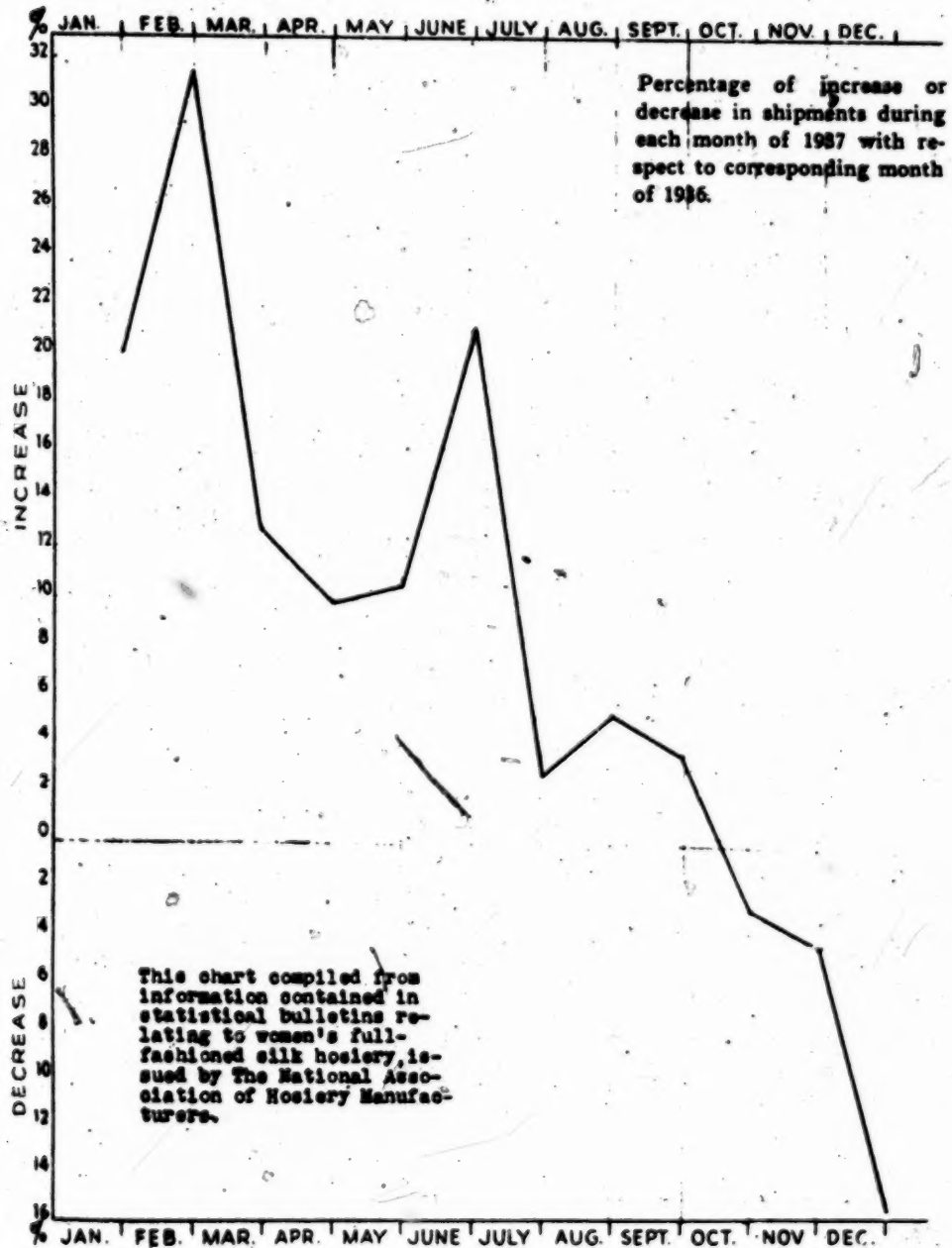
THE COURT:

It has been shown to the jury already.

MR. HIRSCH:

Yes, I have no objection to it.

(A copy of the chart, Exhibit D-10, follows);



MR. HIRSCH:

Now, if Your Honor please, Mr. Constantine was here yesterday, and he has to return to Washington, where he is appearing before the Government Wage and Hour tribunal on behalf of the industry. He came up here at my request and must now take the 3:14 train.

THE COURT:

He can't make it, but I will hear him if you want to.

MR. HIRSCH:

His testimony is most important on the general condition of the industry.

THE COURT:

Go ahead, call him:

MR. HIRSCH:

He can't stay—

MR. CONSTANTINE:

I have got to catch that train. I have to be in conference at six o'clock tonight. I am willing to take the midnight train and come back here the first thing in the morning.

MR. HIRSCH:

He has been here two days.

MR. CONSTANTINE:

I have no conflicting engagements tomorrow. I am compelled to take the 3:14 train. I may barely make it if I hurry.

THE COURT:

You come back and we will try and see what we can do.

MR. CONSTANTINE:

Thank you. I am trying to be in both places at the same time.

THE COURT:

I don't know how it will work out. All I can say is that you better come back if Mr. Hirsch wants you here.

MR. HIRSCH:

Yes.

THE COURT:

I can't guarantee we will re-open the case if it is closed. You better take a chance on it. If you miss the 3:14 you might come back this afternoon.

MR. HIRSCH:

Could I just offer in evidence through Mr. Constantine—

THE COURT:

Oh, we will assume he will testify as to what that is.

MR. HIRSCH:

To this chart, and here is the chart covering the previous year.

THE COURT:

You can probably get a long way without him, as a matter of fact. If those charts are admissible I don't see any reason why he should go on the stand to identify them.

MR. KATZ:

I would only object that they are inadmissible and have no relevancy to the question.

THE COURT:

There is no question of their authenticity.

MR. KATZ:

Unquestionably. They don't help the situation.

MR. HIRSCH:

All right, let's raise the issue as if he were on the stand. I have here, if Your Honor please, a chart prepared by the statistical department of the National Association of Hosiery Manufacturers, showing shipments of women's full-fashioned hosiery for the years 1934 to 1938, inclusive,—

THE COURT:

Let me see it.

MR. HIRSCH:

—by months, and in view of the cross-examination of Mr. Meyer I now submit, sir, that this chart is most relevant.

THE COURT:

Yes, I should think it is:

(Discussion at side bar.)

MR. HIRSCH:

Can I offer this at this time, or otherwise I will have to—

THE COURT:

Well, we may have to call him back, I don't know.

MR. HIRSCH:

Well, I offer it. If Mr. Katz objects I will

call him back. I offer in evidence at this time a statistical report of shipments of women's full-fashioned hosiery for the years 1934 to 1938, inclusive, which represents the total figures on the women's full-fashioned hosiery industry in the United States.

THE COURT:

Now, let me ask you on that report, are you going to argue from that report that business in the last eight months of 1937 was better than it was in the first four months?

MR. HIRSCH:

I am going to argue—

THE COURT:

Will you please answer my question?

MR. HIRSCH:

Yes, but I am going to say—

THE COURT:

All right, that is directly contrary to what Mr. Meyers said, isn't it?

MR. HIRSCH:

Now,—

THE COURT:

Mr. Meyers said the chart was gotten up to convince the tribunal that business was falling off during that period.

MR. HIRSCH:

But, Judge, you are asking about the total. I am going to argue that the total of the last six months was larger than the total of the first six months of 1937, which it was.

THE COURT:

This association didn't cook up a fake chart.

MR. HIRSCH:

No, if you take the total for December, you will find the total for December was less than the previous year, but we are dealing in totals of six months periods. In other words, in 1937 the total was less than 1936 for December—

THE COURT:

Well, I don't understand it, frankly.

MR. KATZ:

May I show you something else?

MR. HIRSCH:

Your Honor, it is very easily understood. If you take the figures you will see that the totals for each of the months of 1937, for the last six months of 1937, were higher than the corresponding six months of 1936 with the exception of November and December, when Mr. Meyer said there was a falling off. I only want—

THE COURT:

Well, then, the chart is wrong?

MR. HIRSCH:

No, it isn't, because the chart shows that it wasn't until November that it fell off.

THE COURT:

Oh, that is quite right.

MR. HIRSCH:

That it fell below the 1936 figures. The chart is actually right, and this is right.

MR. KATZ:

And they take the orders in June and July.

MR. HIRSCH:

But my purpose is that Mr. Constantine, who directed the preparation, would give a complete explanation of the thing, and in his absence I would like to offer this chart and argue from it.

MR. KATZ:

All right, will you let me offer a paragraph from the Special News Letter, "Exit 1937," Mr. Constantine's words, too, that one that is marked off (indicating)?

MR. HIRSCH:

No, not in the absence of knowing whether he prepared that, absolutely not.

MR. KATZ:

This is the special bulletin of the National Association of Hosiery Manufacturers, identified by Mr. Meyer. You don't agree to that?

MR. HIRSCH:

No, I don't deny that—you said Mr. Constantine's words. I don't know whether they were or were not.

MR. KATZ:

The words of the National Association of Hosiery Manufacturers in that paragraph to their members relating to the business—

MR. HIRSCH:

No, I think Mr. Constantine will have to be here, then.

MR. KATZ:

All right.

THE COURT:

You understand, I haven't excused Mr. Constantine, he just said he had to go, and that is all there is to it.

MR. HIRSCH:

Well, Judge, I had no alternative.

THE COURT:

Well, I know you hadn't.

MR. HIRSCH:

I couldn't keep him here.

THE COURT:

But don't get the idea that I agreed to sit tomorrow just to hear Mr. Constantine, if you are through with the testimony. Keep that clear in your mind. I don't want to mislead you.

MR. HIRSCH:

Well, I offer in evidence this chart.

MR. KATZ:

I object to it.

THE COURT:

Well, I will have to sustain the objection at the present time.

MR. HIRSCH:

This is a chart of the statistical department of the National Association of Hosiery Manufacturers.

THE COURT:

It appears to me that it is just about the same thing as the graph.

MR. HIRSCH:

Correct, only that this shows it in dozens, and I think it will be much easier to understand.

THE COURT:

I don't see that it makes much difference, but go ahead.

MR. HIRSCH:

I mean, I don't see any legal objection, practical legal objection, to it. The only technical objection can be that Mr. Constantine isn't here.

THE COURT:

Well, the only objection is that we are not quite sure what it represents, that is, we know who compiled it, and that Mr. Katz isn't objecting to, and we know under what authority it was issued, but we don't know what sources those statistics were drawn from.

MR. HIRSCH:

Well, I will tell you that the statistics are prepared from the Department of Commerce reports, which coincide with them within several dozen.

THE COURT:

Does that mean all the manufacturers in the country?

Mr. KATZ:

Yes.

THE COURT:

Or the North or the South?

MR. HIRSCH:

All the manufacturers in the country.

MR. KATZ:

Everybody.

THE COURT:

If that is all agreed, and it is agreed that it is authentic, I see no objection to it in the matter of relevancy. It is just as relevant as the graph was, and it shows the same thing, in fact.

MR. HIRSCH:

Yes.

MR. KATZ:

In the absence of Mr. Constantine, if he were on the stand I would want him to read this paragraph, just to show under his authority; now, I am willing to permit the chart to go in if Mr. Hirsch will admit also this Special News Letter, which bears on the same question.

MR. HIRSCH:

It doesn't bear on this ground.

MR. KATZ:

It does.

MR. HIRSCH:

I haven't read that. I don't see where it does.

MR. KATZ:

It divides the year up into two parts, the first six months and the last six months, and explains what happened in the last six months. Why won't you let that in?

MR. HIRSCH:

Mr. Meyer has told you what happened.

THE COURT:

I don't think Mr. Hirsch's agreement is necessary. Mr. Meyer has identified that and said it is highly—what did he say, highly—

MR. KATZ:

Reliable.

THE COURT:

—authentic, or reliable.

MR. HIRSCH:

If he wants to offer it on that basis I have no objection to it. He wants to offer it as Mr. Constantine's words.

THE COURT:

I don't care what—it will be received if Mr. Katz offers it in evidence.

MR. HIRSCH:

I have no objection to it, then.

THE COURT:

Yes.

MR. KATZ:

All right, then. I so offer paragraph 3 of a Special News Letter of the National Association of Hosiery Manufacturers, dated December 29, 1937, entitled "Exit 1937" and ask leave to read it to the jury at this time.

MR. HIRSCH:

Are you offering the whole—

MR. KATZ:

No, I just offered paragraph 3, and I will read it to the jury.

THE COURT:

Now, we have got everything in.

MR. HIRSCH:

This is being offered?

THE COURT:

Yes, that is being received.

MR. HIRSCH:

Plaintiff's Exhibit what?

(Statement entitled "Shipments of Women's Full-Fashioned Hosiery 1934-1938 inclusive" prepared by Statistical Department, National Association of Hosiery Manufacturers, Inc., was marked Exhibit P-28. A copy thereof follows:

Exhibit P-28

"SHIPMENTS OF
WOMEN'S FULL-FASHIONED HOSIERY
1934 - 1938 inclusive

Prepared By:

Statistical Department

National Association of Hosiery Manufactur-
ers, Inc.

Year	January	February	March	April	May	June	July	August	September	October	November	December	Yearly Total
1934	\$1,922,662	\$2,384,804	\$3,014,302	\$2,617,593	\$2,697,765	\$2,322,190	\$1,546,533	\$2,478,448	\$2,681,151	\$3,316,979	\$3,292,352	\$3,050,755	\$31,325,534
1935	2,408,846	2,547,668	3,065,054	2,924,958	2,716,163	2,311,214	1,948,231	3,088,453	3,275,698	4,131,290	3,159,368	2,692,120	34,269,061
1936	2,114,923	2,434,615	3,370,506	3,065,759	2,729,091	2,574,324	2,530,045	3,098,521	3,785,897	3,961,022	4,026,411	3,709,689	37,400,782
1937	2,525,811	3,205,227	3,803,000	3,368,113	3,020,953	3,118,593	2,660,047	3,262,941	3,918,881	3,855,831	3,847,479	3,143,018	39,678,494
1938	2,231,765	3,267,722	4,089,887	3,568,033	3,286,578	3,128,361	2,358,673	3,756,098	4,016,028	4,060,923	4,496,081	3,735,012	41,944,161

(NOTE: The eight high-shipment months of each year are given in bold type")

MR. KATZ:

"At the end of the first six months of the current year our shipments were 16% ahead of the corresponding months of 1936. In several of the succeeding months shipments this year were below shipments for the same months a year ago. This was due in part to the general recession in business, and in part, doubtless, to over-buying of hosiery during the first half of the year which had to be offset by lower buying in the remaining months of the year. It continues to remain true that no man can eat his pie and still have it. It also remains true that during the last several months, as shipments reduced, most of us have forgotten the good condition which existed during the first half of the year."

MR. HIRSCH:

And I accept that statement that during the last several months the shipments reduced. I think that is Mr. Meyer's testimony, during the last several months of the year.

MR. KATZ:

Now, it stands for what I read it, why do you have to tell me—

THE COURT:

There is no use of arguing it, Mr. Hirsch.

MR. HIRSCH:

All right.

THE COURT:

You can argue to the jury when you go to the jury.

MR. HIRSCH:

All right.

(Excerpt from the December 29, 1937, issue of the Special News Letter of the National Association of Hosiery Manufacturers was marked Exhibit D-11. A copy thereof follows:

Exhibit D-11

"At the end of the first six months of the current year our shipments were 16% ahead of the corresponding months of 1936. In several of the succeeding months shipments this year were below shipments for the same months a year ago. This was due in part to the general recession in business, and in part, doubtless, to over-buying of hosiery during the first half of the year which had to be offset by lower buying in the remaining months of the year. It continues to remain true that no man can eat his pie and still have it. It also remains true that during the last several months, as shipments reduced, most of us have forgotten the good condition which existed during the first half of the year.")

THE COURT:

I wonder if Mr. Struve might be able to give me some information?

MR. HIRSCH:

Yes, I was just looking at my notes to call him on that "normal." Didn't you want to hear him on that?

THE COURT:

Yes, that is what I wanted to ask him.

MR. HIRSCH:

Mr. Struve, will you take the stand?

F. ELWOOD STRUVE, recalled.

Redirect Examination

BY THE COURT:

Q. Mr. Struve, did you assist Mr. Langer in getting up his audit and in preparing his testimony for this case?

MR. HIRSCH:

On that one point—

BY THE COURT:

Q. Well, did he get any information from you? Well, let me put it this way,—

A. Well,—

Q. Let me call your attention to this. Can you help with this? Mr. Langer testified that—

THE COURT:

Well, during what period was that deficiency, during the last eight months—

MR. HIRSCH:

August 19th until—

THE COURT:

Yes, August 19th up to October 29th, I have it here, seventy-one days.

THE WITNESS:

That is right.

THE COURT:

Let me start over again.

BY THE COURT:

Q. From August 19th, when you started operations, to October 29th, when you had made all your major repairs and were practically in full operation, or practically full ability to operate, seventy-one days, there was a deficiency in your equipment, I believe, or your productive capacity of 21.88 per cent. Now, I asked Mr. Langer what that was 21.88 per cent of, and he wasn't able to tell me, and perhaps you can tell me. What is the figure that you start with there to get the deficiency? Is that full-time production of every—

A. That is—

Q. —machine, or is it normal production based on experience during some period, or what is it? What is that?

A. That is normal production.

Q. Well,—

A. Which we—we usually figure that at about eighty-five or ninety per cent.

Q. Of full capacity?

A. Of full capacity.

THE COURT:

Well, now, that is what I wanted to know.

BY THE COURT:

Q. In other words, it was twenty-one per cent of about eighty per cent, eighty to eighty-five per cent?

A. That is right.

THE COURT:

Yes, all right. That tells me what I want to know.

MR. HIRSCH:

That is all, Mr. Struve.

THE COURT:

Wait just one minute.

MR. HIRSCH:

I beg your pardon.

BY THE COURT:

Q. That is just an arbitrary figure that you take as normal production?

A. Well, that, we estimate—

Q. Based on experience?

A. Based on experience.

Q. It is an estimate?

A. Yes, I generally estimate that production for Mr. Meyer.

Q. All right. Now, was the rate at which you repaired these machines, beginning August 19th and going on up to October 29th—did the repair and installation of the finished machines proceed at a fairly regular rate?

A. Oh, yes.

Q. So that it wasn't all done at once, it was done regularly, progressively, is that right?

A. Well, yes, we—

Q. Yes.

A. We had quite an ambition to get the place going.

THE COURT:

All right. Well, I guess that is all.

MR. HIRSCH:

I have a question to ask.

BY MR. HIRSCH:

Q. Mr. Struve, Mr. Langer testified that this was computed on the basis of the machines which were damaged and those which were actually able to run. What is the effect, for example, of a footer being out of commission by reason of damage in so far as it relates to other machinery? Will you explain what would happen if a footer is out of commission?

A. Well, if a footing machine is out of commission that places an additional three machines out of condition, with that footer.

Q. What kind of machines?

A. Legging machines.

Q. Will you explain why?

THE COURT:

Oh, well, we will accept his statement for that. Of course, that is pretty obvious.

Let me ask one more question. Now, I am going back and asking this question to the element of physical damage, and I don't want—I don't want to open the subject up again for cross-examination, and it may be that—it may be that it has already been testified to.

BY THE COURT:

Q. The damage to these machines that you sent to Reading, was that all damage of a character which could have been done in a very short time, or did it take time to damage those machines that way? I think we had some testimony on that. In

other words, take your average damaged machine, pick out a representative damaged machine, how long would it take to put it in that condition, a man with a bar or monkey wrench?

A. I believe those machines could be damaged within a couple of minutes.

THE COURT:

That is all I wanted to know. All right, gentlemen.

MR. HIRSCH:

Pardon me, one other question, while you are on that.

BY MR. HIRSCH:

Q. How many parts are there in a machine?

A. Well, I believe there is over a hundred thousand parts.

THE COURT:

Yes, we had that.

MR. HIRSCH:

Did we? I didn't remember.

THE COURT:

Yes.

MR. HIRSCH:

Mr. Langer, just one question. Will you take the stand?

JOSEPH C. LANGER, recalled.

Redirect Examination (Continued)

BY MR. HIRSCH:

Q. Mr. Langer, you were questioned this morning regarding profit you computed the company to have made during the period of January 1st to May 6th, 1937 from its ~~hos~~ary operations alone. In computing that profit, did you deduct from the gross profit anything for depreciation of plant and equipment?

A. Yes, sir.

Q. And was the rate of reduction for plant and equipment which you applied for the period January 1st to May 6th the same rate of reduction, same percentages, and so forth, which you applied in computing the overhead expenses which the company had to necessarily incur while it was shut down?

A. I did.

MR. HIRSCH:

That is all, Mr. Steeple.

MILTON S. STEEPLE, recalled.

Redirect Examination

BY MR. HIRSCH:

Q. Did you—I don't know whether you did or not—compile figures relating to the 10,699 dozen—

A. Yes.

Q. —of seasonable goods which you had on hand, some of which you said you subsequently sold and some of which you still have on hand?

A. I have that.

Q. Will you tell us, first, how many dozen—where are those figures?

A. They are on top there (indicating).

THE COURT:

You also might bring those figures if you got them up for me, the ones I asked.

THE WITNESS:

I am preparing them.

THE COURT:

Oh, you are still preparing those. All right.

BY MR. HIRSCH:

Q. Tell us, first, how many dozen out of this ten thousand, odd, total were sold, and the loss which you sustained in the market price as being the difference between that for which they were sold on May 6th and that which you actually received later.

A. It was a total of 2351 dozen.

Q. What had those sold for?

A. Various prices.

Q. What was the average?

A. Well, the average will bear to the amount—why, I can give it to you, \$5.25, \$6.00, \$6.25, \$7.50, \$7.55—

Q. Wait a minute, do you have it in dollars both ways?

A. Yes, I have the dollars.

Q. Well, then, tell us what the dollar value was.

A. I don't have the value—I have the value at which they were sold, and the difference.

BY THE COURT:

Q. All right, what was it?

A. I have the difference.

MR. KATZ:

Take it that way.

THE WITNESS:

Sold at \$3,192.75. That was not the selling price. That was the difference between selling price and the price at which they were sold.

BY MR. HIRSCH:

Q. In other words, irrespective of the average price per dozen, you took the total that they were sold for originally and the total which you actually received for them later when you had to sell them out of season?

A. That is right.

Q. And the difference is \$3,192.75?

A. Seventy-six cents; to be exact.

Q. Now, then, how many dozen—strike that out. And the remaining seventy-seven hundred odd dozen are still on hand?

A. That is right.

Q. Now, will you tell us what the present value of those stockings is?

A. Twenty-one—about \$21,648.51.

Q. And what was the value on May 6th?

A. Well, I haven't computed it that way, I computed it, the difference in the price, the selling price, and what we—

BY THE COURT:

Q. Well, what is it?

A. —we expect to get for them.

Q. What is it?

A. Well, it varies in styles, Your Honor.

BY MR. HIRSCH:

Q. What is the total?

BY THE COURT:

Q. What is the total?

A. Well, I can't give you that in the way I have worked it up.

Q. All right.

A. I have worked it up in the difference in the selling price and the price at which we could sell those goods today.

BY MR. HIRSCH:

Q. And how much in dollars do we stand to lose?

A. \$21,648.51.

Q. And in determining that figure you applied a value to the stockings still on hand?

A. That is correct.

Q. They were all seasonable stuff, I think you described them as knee-highs and "shortees"?

A. Yes.

BY THE COURT:

Q. They have been sold?

MR. HIRSCH:

They haven't been sold.

A. We had orders for them.

THE COURT:

That is what I mean.

THE WITNESS:

We received cancellations for a lot of them after the season passed.

THE COURT:

All right, cross examine.

Recross Examination

BY MR. KATZ:

Q. You mean you had orders for the whole 10,699 knee-highs?

A. They wasn't knee-high goods, there was some brown-heeled goods, some embroidery goods, and some shadow-clocks.

Q. Were they made up on specification of customers?

A. Most of them were, yes.

Q. Don't answer "most of them". Which were, and which were made up for stock.

A. None of them were made for stock, they were all made against orders.

Q. Every one of them—

A. Yes.

Q. —was against an order?

A. Yes, we had orders—

Q. I see.

A. —for them.

Q. Now, can you show me those orders?

A. There they are (indicating).

Q. You are showing me a confirmation of an order on August 8, 1938.

A. Wait a minute. Maybe we have got all of them in there.

MR. HIRSCH:

He means the orders you originally had.

THE WITNESS:

Yes. These are the orders showing the revised price which we had to sell them.

BY MR. KATZ:

Q. I asked you for the orders—

A. Yes, I know.

Q. Then we will look at those.

A. Yes.

(The witness examined the records.)

THE WITNESS:

No, I don't have the orders for the original orders. I could produce those. I brought these orders to substantiate the difference in the price.

BY MR. KATZ:

Q. Just a moment, Mr. Steeple, you made a statement that you had orders against these stockings.

A. Yes.

Q. And when I asked you for the orders you showed me orders dated August 8th, 1938?

A. That is correct, I did that, and I justified why I did it.

BY MR. HIRSCH:

Q. Now, do you have the orders which you originally received for the stockings?

A. I believe I can get all those together. Some of our records were destroyed.

Q. When?

A. On May 6th.

Q. And have you examined the records that were available?

A. I have not, I didn't compare them in this

matter. I thought this was the manner in which they should be prepared.

BY THE COURT:

Q. Well, where did you get your figure for the price?

MR. KATZ:

That is right.

BY THE COURT:

Q. You gave us the difference between the present value and—

A. That was our list price for those styles.

Q. Oh, you just took the list price?

A. Yes.

BY MR. HIRSCH:

Q. Is the list price the price at which you sell, or do you break price below list?

A. No, we sell at list.

THE COURT:

I see.

BY MR. KATZ:

Q. I want to know this. Are you estimating you had orders, or did you actually have the orders?

A. No, I am quite certain I could produce—of course, it would take a little time—I could produce orders for all the goods which we had on hand.

Q. Were those records destroyed?

A. I can't say offhand, now.

Q. You don't know whether those records exist or not?

A. I don't until I make a complete search.

Q. You had no difficulty in producing every

other record involving every other item of damage, did you?

A. I wouldn't say I did, no.

Q. You had no difficulty at all.

A. No.

Q. But on this item you brought with you orders for 1938.

A. For the reason I just expressed.

Q. Well, I don't care about the reason. That is all you brought?

A. That is right, that is right.

MR. KATZ:

If Your Honor please,—

THE WITNESS:

I did make the offer to attempt to get the orders for you.

MR. KATZ:

—I move to strike the testimony.

THE COURT:

Let it stand until tomorrow morning. He will try to get the orders to cover those. Then I will rule on them.

Now, is there anything further?

MR. HIRSCH:

That is all, and I think that, if Your Honor please, completes our case.

THE COURT:

The only two things left, now, are Mr. Steeple's orders and then that list of monthly sales that he is going to give me.

THE WITNESS:

Yes, I have already telephoned the office and we are preparing that now, Judge.

BY MR. HIRSCH:

Q. You will have that for the Judge in the morning?

A. I am quite sure I will have it first thing in the morning, if not later in the morning.

MR. KATZ:

Does the plaintiff rest?

MR. HIRSCH:

Plaintiff rests.

MR. KATZ:

So do the defendants.

THE COURT:

All right, let me confer with counsel as to what we will do. It is understood, of course, now, that both sides have rested and all testimony is in with the exception of the two matters which I have just referred to.

Let me ask the jury to wait about a half an hour and we will try to work it out so that we can let you know just when to come back. I will confer with counsel on the proceedings, and there will be a legal argument. Probably the jury won't need to be present.

MR. HIRSCH:

Mr. Steeple says if you will wait he has some cancellations here that will prove that he originally had an order. Otherwise he can't get a cancellation—

THE COURT:

That will prove—

MR. HIRSCH:

Do you have some there?

MR. STEEPLE:

Yes, I have some.

THE COURT:

All right, wait until we work it out.

Would you, Members of the Jury, recess for half an hour, and then come back here, and then I will be able to let you know just what time we are coming back, how we are going to work this out over the week end.

(Recess at 3:25 o'clock P. M.)

(Subsequently the jury was excused for the day.)

(Adjourned until Friday, March 31st, 1939, at ten o'clock A. M.)

Philadelphia, Pa., March 31, 1939

Tenth Day

Plaintiff's Evidence (Continued)

THE COURT:

Now, is there any more testimony to be offered?

MR. HIRSCH:

Yes, there is that one bit that you left open.

THE COURT:

Mr. Simons, I asked yesterday for a tabulation of orders received month by month from August 1st to December 31st, 1937, and I have it here, and if it is satisfactory it can just be put in evidence.

MR. SIMONS:

May I see it?

THE COURT:

There it is. I guess there is no doubt about it. You can just put that list in evidence.

MR. SIMONS:

They are just the orders received, they are not the merchandise shipped?

THE COURT:

No, just the orders received month by month.

MR. HIRSCH:

About the same.

MR. SIMONS:

Well, the merchandise shipped was a million and a half.

THE COURT:

It is not the merchandise shipped.

MR. SIMONS:

Yes.

THE COURT:

It is just the orders received. I wanted that. You already have testimony on the other.

MR. HIRSCH:

Yes.

THE COURT:

What I wanted was month by month.

(List of orders received August 1, to December 31, 1937 was marked Exhibit P-29. A copy thereof follows:

Exhibit P-29

**"ORDERS" RECEIVED AUGUST 1, to
DECEMBER 31, 1937**

AUGUST 1-8 70,251 DOZEN \$381,652.11

AUGUST 19-31	23,463	DOZEN	\$152,991.05
SEPTEMBER	27,022	"	187,382.91
OCTOBER	19,261	"	131,279.89
NOVEMBER	45,490	"	234,842.18
DECEMBER	9,109	"	56,447.75
	124,345	"	\$762,943.78")

MR. HIRSCH:

Now, we have that one other item.

THE COURT:

What is that?

MR. HIRSCH:

Mr. Steeple, on the seasonable merchandise.

THE COURT:

All right.

MR. HIRSCH:

He was to get the orders.

THE COURT:

All right.

MILTON S. STEEPLE, recalled.

Redirect Examination

BY MR. HIRSCH:

Q. Mr. Steeple, yesterday you testified on the question of seasonable goods which you had on hand on May 6th, 1937, totaling some ten thousand, nine hundred odd dozen, which as a result of your inability to get into your plant and ship the merchandise became unseasonable, so to speak, and you testified as to the loss sustained. Now, you were asked to produce the orders which you had on hand on May 6th, or evidence that you had on hand orders which would enable you to fix the price for which they could have been sold as compared to the price for which you ultimately did sell them or for which you now hold them? Have you secured that data?

A. I have it.

Q. Will you produce it to Mr. Simons? What do you have there?

A. I have the orders.

MR. HIRSCH:

Mr. Katz wants them. Do you want to sit down for a minute with Mr. Katz?

THE COURT:

All right, dont take too long.

MR. KATZ:

No, just to look at them.

THE COURT:

Just go over to counsel table and show them.

(Discussion off the record.)

MR. KATZ:

I think this witness will have to take the stand.

THE COURT:

All right.

(Discussion off the record.)

THE COURT:

Well, take the stand, please.

MR. HIRSCH:

Take the stand and tell us what you have. Now, tell us, Mr. Steeple, just what you have there and explain it for the purpose of His Honor and the members of the jury.

MR. KATZ:

Now, is he on cross examination?

MR. HIRSCH:

Well, I want to, first—now that you haven't gotten together, I want to first ask him what he has got.

THE WITNESS:

I have the orders here, first, against the stock which we had on May 6th of this summer stock, so-called summer stocks. I also have the confirmation—

BY MR. HIRSCH:

Q. Wait a minute, what do you mean by the orders? You have there the orders which you had unfilled?

A. I have the confirmations of the orders. I couldn't get all of the original orders out because

it is two years ago and I didn't have sufficient time to get them.

Q. But you have what there?

A. I have here the confirmations of the orders, and in some cases the original order.

Q. Now, what do you mean by a confirmation, something you received from the customer—

A. An order which—

Q. —or something which you sent back to the customer?

A. Something which when an order is sent in from a customer, or from our salesman, we confirm the order.

Q. Even though you may not have the order, then, you have your confirmation of its receipt?

A. That is correct.

Q. All right, what else do you have?

A. I have the orders—confirmations of the orders at the lower price at which some of these goods were sold.

Q. You are talking now about the subsequent orders which you received for these goods on which you sustained a loss?

A. That is correct.

Q. What else do you have?

A. Well, that is about all. I have a chart here showing the grouping of it.

Q. And was that a chart that you prepared from these confirmations and sales that were subsequently made?

A. That is correct.

Q. And what does that indicate?

A. In what respect?

Q. Does that indicate the prices for which you had this merchandise sold in May—

A. And the price at which we did sell a portion of it, or the price at which we figure that we can secure for the goods.

Q. Present value?

A. If we can sell them.

MR. HIRSCH:

All right, cross examine.

Recross Examination

BY MR. KATZ:

Q. Now, may I see the original orders that you had on hand on May 6th for this merchandise?

MR. HIRSCH:

You are now talking about the customers' orders, is that right, the orders we received?

MR. KATZ:

The orders he is speaking about.

MR. HIRSCH:

All right.

A. That is on style 373, which is an embroidery style. (Indicating).

BY MR. KATZ:

Q. And that covers four thousand dozen?

A. Four thousand dozen, against which there was no goods shipped at all, and there is a letter in there from the customer insisting upon cancellation of the order.

BY THE COURT:

Q. Those are still on hand?

A. Yes—not the four thousand dozen, there is only about 593 dozen of those still on hand.

Q. But the others were sold at these lower prices?

A. 563 dozen.

Q. Is that right?

A. No, we didn't manufacture all of those goods, we didn't get a chance to manufacture all of them. Of those, that particular style, there was 109 dozen sold, and 563 dozen still on hand.

BY MR. HIRSCH:

Q. And is your loss computed on the actual manufactured goods?

A. Yes.

THE COURT:

No, he has computed it on the contract price.

BY THE COURT:

Q. Haven't you?

THE WITNESS:

Yes, but only on the goods we produced, not on the four thousand dozen, there is loss in there for that.

MR. HIRSCH:

We are not making claim for that.

THE COURT:

All right.

THE WITNESS:

Only for the actual stock produced.

THE COURT:

All right.

BY MR. KATZ:

Q. Show me the next order?

BY THE COURT:

Q. How much is that?

MR. KATZ:

Four thousand dozen, Your Honor.

THE COURT:

It doesn't cover that much.

BY THE COURT:

Q. How much are you claiming?

A. We are making claim for the difference of three dollars a dozen on 109 dozen—the same on the whole total, it would be 672 dozen at three dollars a dozen.

Q. All right, all of which you did produce?

A. We did produce, but we were unable to ship.

BY MR. KATZ:

Q. All right, now, show me the next order.

A. Here is the order for style 214, which is a knee-high style.

BY THE COURT:

Q. How many of those did you produce?

A. Our stock on hand on May 6th was 3606 dozen. We sold 1073 dozen at various prices, ranging from—

Q. How many dozen did you sell, one thousand—

A. 1073 and one-half dozen, to be exact. They were sold at various prices, four and one-quarter—

Q. Well, what is the total? What was the loss on that? How did you figure it?

A. The loss on that was the difference of \$759.38.

BY MR. KATZ:

Q. On how many dozen?

A. On 1073½ dozen.

Q. Now, I show you the New Mode Hosiery Company—

BY THE COURT:

Q. Seven hundred and what?

A. \$759.38.

Q. All right.

BY MR. KATZ:

Q. Now, I show you the New Mode Hosiery Company order dated April 6, 1937. That is the order you are now referring to?

A. That is one of the orders.

Q. All right, now, confining your testimony to this order,—

A. Yes.

Q. —it calls for delivery April, May and June, doesn't it?

A. That is correct.

Q. How much did you deliver against that order?

A. I am unable to say what we delivered.

Q. How much remained unsold?

A. Unsold—the whole goods were sold—undelivered I can't tell you at this date, because we didn't have sufficient time to get that from last night.

Q. Are you charging us for failure to sell one thousand and under this contract—

A. No.

Q. —and deliver same to the purchaser?

A. Our charge is only based on our stock, that we had, against which we had these orders. That amounts to 3291 dozen, for which we are claiming just a dollar a dozen difference, \$3,291.

Q. But when you make a promise to deliver in April, May and June, you do deliver in April, May and June?

A. Not necessarily.

Q. Not necessarily?

A. No, that is a blanket order.

Q. Does that say—

A. The customer—

Q. Does that say—

A. The customer has the privilege of detailing as to color details any time during that period.

Q. Yes, and does that say delivery for April, May and June?

A. That is correct.

Q. Did you deliver in April?

A. I can't state that—

Q. All right.

A. —at this time.

Q. All right. Now, here is an order—

A. We may have delivered a portion of it and we may not. I couldn't get the information together—

Q. I am only asking you whether or not you know or don't know. Do you know?

A. I answered that.

Q. You don't know?

A. I don't know—

Q. All right.

A. —what portion, if there was any, or what portion was shipped in May.

Q. All right.

A. Or April.

Q. Now, we come to the Lisbon Hosiery Shops, Incorporated, order of March 16th, deliveries called for March, April, May and June. How much of

this five hundred dozen in the order was actually delivered?

A. Same answer.

Q. You don't know that, either?

THE COURT:

Well, you can't recover from that. It may have all been delivered, as far as he knows. There is no evidence that it wasn't all delivered.

BY MR. HIRSCH:

Q. Well, what information have you as to whether any or all of that was—

THE COURT:

He says he doesn't know.

MR. KATZ:

He doesn't know.

THE WITNESS:

I didn't have sufficient time to get that information.

MR. HIRSCH:

Of course, it is obvious it wasn't all delivered. It is for three months, April, May and June.

THE COURT:

There is no evidence it wasn't. It could have been all delivered in April. You can't claim for that.

BY MR. HIRSCH:

Q. Well, who would know whether—

MR. KATZ:

I object to this.

THE COURT:

I certainly am not going to string the case out. It could have been prepared so it could have been proved, and it isn't proved, that is all.

MR. HIRSCH:

Well, if Your Honor please, this is not a matter that you can sit down and determine with such definiteness.

THE COURT:

He says if he had time he could do it.

MR. KATZ:

Well, he had plenty of time.

THE WITNESS:

I might add, Your Honor, on all of these styles here, with the exception of two of them, are numbers that were contained in our regular line, and, naturally, we had to produce in advance of the season goods to take care of those requirements. In other words, it takes a long time to get goods through the mill. We have got to be in the position to make delivery—

BY MR. HIRSCH:

Q. Let me ask a question—

THE WITNESS:

—within a reasonable time.

BY MR. HIRSCH:

Q. Let me ask a question. What would the season be on these goods, assuming you hadn't any of them sold on May 6th, what would be the months for their delivery?

A. June, July and August.

Q. All right, and—

MR. KATZ:

Oh,—

MR. HIRSCH:

Well, now, just a minute.

MR. KATZ:

Well, it says March, too, and April.

MR. HIRSCH:

I am not talking about any order, now.

BY MR. HIRSCH:

Q. You had on hand on May 6th of seasonable variety some ten thousand odd dozen, didn't you?

A. That is correct.

Q. And ordinarily they would have been sold during the months of May and June?

MR. KATZ:

That is objected to.

A. Yes.

BY MR. HIRSCH:

Q. So in your opinion—

MR. KATZ:

Just a moment,—

THE COURT:

Oh, I can't take this.

THE WITNESS:

They would be sold—

MR. KATZ:

Just a minute, please.

MR. HIRSCH:

Don't answer the question.

THE WITNESS:

All right.

MR. HIRSCH:

Let us assume for argument's sake they didn't have an order on hand—

THE COURT:

We have got to guess they would have been ordered.

MR. HIRSCH:

But, if Your Honor please, we have stock here on hand which has to be sold during that season or you lose the benefit of the price.

THE COURT:

Suppose it couldn't be sold.

MR. HIRSCH:

There is no evidence it couldn't. The evidence is in this man's opinion it could.

THE COURT:

The evidence is in his opinion it could, but that is only a guess.

MR. HIRSCH:

If Your Honor please, when our plant is shut down against our will on May 6th, and we have at that time seasonable goods which ordinarily would have been sold in May, June and July, it is for the jury to determine as a matter of fact, from all the evidence, whether we would or would not have sold it.

THE COURT:

Suppose you had missed your styles altogether, and your designer had been crazy, and designed a lot of stuff that was totally unsalable, you couldn't—

MR. HIRSCH:

That is for the defense to bring out, if we had crazy designers.

THE WITNESS:

I think I can help on that. In this particular style, during the month of April, I have a transcription from our regular order records, we received on this particular style orders for 5618 dozen, in April. It shows it was a real active style.

MR. HIRSCH:

I don't think there is any guessing about it, if Your Honor please. We had orders on hand for delivery in April, May and June. We had seasonable stock which was ordinarily sold in April; May and June, and we had that stock on hand and were prevented from using it, and I think it is for the jury to decide whether or not we could have sold that at our then list price, or whether we would not have sold any of it. Now, it may have been we wouldn't have sold any of those dozens, that may be the defendants' argument. I am going to argue, if it is permitted to go to the jury—

MR. KATZ:

Well, now, please,—

MR. HIRSCH:

—that they had the right to say so,—

MR. KATZ:

—I don't think this is fair.

MR. HIRSCH:

—that is for the jury to say—

MR. KATZ:

It is prejudicial to the defendants.

THE COURT:

Why?

MR. KATZ:

Because he is arguing the very point at issue.

THE COURT:

I don't believe the jury has the slightest idea where this fits into the case, until they are told. It will appear later on. I hardly know myself.

I think it is a doubtful item, Mr. Hirsch. If you want to press it I will let it go in.

MR. KATZ:

Now, may I say something?

THE COURT:

I think it is an extremely doubtful item.

MR. HIRSCH:

I would like to leave it for the jury's consideration.

THE COURT:

Very well.

MR. KATZ:

May I say something on the point, or am I foreclosed?

THE COURT:

If it turns out to be erroneous there will have to be a new trial granted.

MR. HIRSCH:

Well, if that is your ruling I will withdraw the item.

THE COURT:

Well, my ruling is just what it is.

MR. HIRSCH:

Well, I will withdraw the item, then. The rest of the case is too important to be prejudiced by that item.

THE COURT:

I think it is a very doubtful item.

MR. HIRSCH:

I don't withdraw the whole item. There are some things that have been proved.

THE COURT:

Yes.

Redirect Examination

BY MR. HIRSCH:

Q. What other things have you support for? I am talking about actual orders; what was cancelled after May 6th.

THE COURT:

\$1,016 has been proved.

BY MR. HIRSCH:

Q. Go ahead, either by orders or confirmations.

A. I have an item here of shadow-clock style, various colors of shadow-clock.

BY THE COURT:

Q. How many?

A. 2,593 dozen.

Q. Had that been—had all that been ordered?

A. I have confirmations here extending all the way up to September of 1937.

BY MR. HIRSCH:

Q. Was any of it delivered?

A. That I have to answer the same way.

Q. When does delivery begin?

A. Begins in early March.

BY MR. KATZ:

Q. March?

THE COURT:

You see, he can't tell.

MR. HIRSCH:

All right, that is in the same class.

MR. KATZ:

All right, pass that and come to your next one.

MR. HIRSCH:

Let me approach it in a different way.

MR. KATZ:

Well, now, he is under cross examination.

MR. HIRSCH:

All right, go ahead.

MR. KATZ:

Let's handle the case and we will get through with it quicker.

THE WITNESS:

This is style 313. There are other styles on there, but the only one in question is style 313.

Recross Examination

BY MR. KATZ:

Q. Style 313?

A. That is a brown heel style.

BY THE COURT:

Q. All right, now, is that the same category as the others? Do you know whether it has been delivered or not?

A. I can't say what portion.

THE COURT:

What is the use of talking about those things? I can't tell whether they have been delivered or not.

BY MR. HIRSCH:

Q. How many dozen stockings have you on hand out of the original ten thousand? Let's approach it in a different way.

A. I would say around eight to nine thousand dozen.

Q. And what was the—

MR. KATZ:

Just a moment,—

BY MR. HIRSCH:

Q. —market value of those stockings—

MR. KATZ:

—I object to this. I object to this. They are trying to get it again, both ways.

MR. HIRSCH:

No, this would be different.

MR. KATZ:

Well, now, may I finish my point?

MR. HIRSCH:

Go ahead, finish.

MR. KATZ:

This claim was allowed to remain open on the ground that there was a proof of an actual order which was cancelled. Now it turns out there is no such evidence and he wants to get it in now —

MR. HIRSCH:

I object to that statement.

MR. KATZ:

—in an entirely—

MR. HIRSCH:

There is evidence of orders. They are deliverable over April, May, June and July.

MR. KATZ:

They may have been delivered.

MR. HIRSCH:

Don't say we don't have orders. We have orders.

MR. KATZ:

We haven't seen them.

THE COURT:

Well, now, gentlemen, I think you ought to be able to arrive at some figure here that is a proper allowance. There is probably some figure that is proper.

MR. KATZ:

I think so.

THE COURT:

If you can't do it—

Redirect Examination.

BY MR. HIRSCH:

Q. Do you have any orders there for delivery after May 6th?

THE COURT:

You can spend time on this item if you want to.

MR. KATZ:

No, I don't want to.

A. Yes, lot of orders after—

BY MR. HIRSCH:

Q. Do you have any orders there for only after May 6th?

MR. KATZ:

How much do you think you have?

MR. HIRSCH:

I don't know.

MR. KATZ:

I can't allow you to prove twenty-four thousand this way.

(Discussion off the record.)

MR. LEVIN:

Can't we do it later?

MR. KATZ:

No, not later. Everything has been done later.

THE COURT:

Oh, no, there is no reason why this shouldn't have been all in shape to produce.

BY MR. HIRSCH:

Q. Do you understand my question, orders the deliveries on which begin in May and not before?

A. There is an order here for fifteen hundred dozen of the shadow-clock during—delivery July to September.

Q. All right.

MR. KATZ:

All right.

BY MR. HIRSCH:

Q. Was that order cancelled?

A. Well, we have the goods on hand yet.

Q. All right, how many dozen?

A. This order was for fifteen hundred dozen. Our stock is approximately twenty-five hundred dozen.

Q. What was the price—just take fifteen hundred, now.

A. Yes.

Q. What was the price for which they were sold and the price for which you now value them? What is the difference in the price per dozen?

A. \$2.75.

Q. That is the difference?

A. The goods were sold at \$7.75 and we have put an anticipated price of five dollars on it. Whether we can get that we can't tell, we may have to sell them off four and a half, or irregulars, but they are the type of goods that only can be sold certain times of the year, and we can't even dispose of them at this time.

Q. That is a difference of \$2.75 per dozen?

A. Yes. That amounts to \$7,130.14.

Q. No, it doesn't; \$4,125.00.

BY MR. KATZ:

Q. Is this \$2.75 supposed to be market price?

MR. HIRSCH:

That is the difference between what it was sold for and the present value.

THE WITNESS:

I have the orders here.

MR. KATZ:

All right, let's close the item.

THE COURT:

How much is it?

MR. HIRSCH:

\$4,125.00.

BY MR. HIRSCH:

Q. It was sold for \$7.75 altogether?

A. Yes.

BY MR. SIMONS:

Q. Was it subsequently sold for five dollars?

A. No.

THE COURT:

No, it wasn't, but he says that is the highest market he can get at the present time. He is competent to say.

THE WITNESS:

I doubt whether we can get that.

THE COURT:

All right.

BY MR. HIRSCH:

Q. Give us another order the delivery of which was after May 6th.

A. I don't believe I can pick out any particular order here,—

Q. All right.

A. —the delivery is of orders beyond May 6th.

THE COURT:

Well, then, you have a total of \$1,016, and \$4,125, or—

MR. HIRSCH:

It is \$2,116, isn't it, Judge, 672 dozen at three dollars a dozen?

THE COURT:

Yes, that is right. What is it?

MR. HIRSCH:

\$2,116.00.

THE COURT:

Yes.

MR. HIRSCH:

And \$4,125.00.

THE COURT:

That is right.

MR. HIRSCH:

What does that total?

MR. KATZ:

Now, Your Honor, I think that first item is subject to the same ruling, because it turns out deliveries to be made beginning March 22nd. It is in the same category.

THE COURT:

All right, now,—

MR. KATZ:

That is out.

THE COURT:

—\$4,125.00.

MR. HIRSCH:

\$4,125.00.

THE COURT:

All right.

MR. HIRSCH:

We will withdraw as to the rest, and end this.

THE COURT:

All right. Is that all?

MR. HIRSCH:

That is all.

MR. KATZ:

That closes the case!

MR. HIRSCH:

Yes, sir.

Colloquy
Motion for Directed Verdict

1305

THE COURT:

Now, gentlemen, there are certain stipulations that will have to be placed on the record.

MR. KATZ:

Before you do that, Your Honor, may I hand up a motion in accordance with Rule 50 (b)?

THE COURT:

To do what?

MR. KATZ:

Motion for a directed verdict for the defendants.

THE COURT:

Yes. That is a motion for a directed verdict?

MR. KATZ:

Directed verdict.

THE COURT:

That motion is denied.

MR. KATZ:

Yes.

THE COURT:

I will also deny the motion to suspend the case and submit to arbitration, which was made earlier in the case.

MR. SYME:

Now, Your Honor, there was a stipulation to be entered into.

THE COURT:

All right. I think maybe you better come to side bar on these stipulations.

(The following occurred at side bar:

THE COURT:

It is stipulated between the parties—and if counsel desire they may state to the jury—that the plaintiff is not seeking a verdict against individual members of the union, and that under no circumstances will any process issue against any individual member of the union except the named defendants. That is all right?

MR. HIRSCH:

That is all right.

MR. SYME:

Yes.

THE COURT:

It is further stipulated that the provision of Rule 51 requiring the submission of points prior to the address of counsel to the jury and information by the Court of proposed action on points shall be waived and counsel will submit points for charge after the conclusion of their addresses to the jury.)

THE COURT:

Well, there is just one more question, gentlemen, that is, about these depositions. Are you going to offer them in evidence?

MR. HIRSCH:

I have offered them in evidence.

THE COURT:

Well, Mr. Lilly thinks that there should be a stipulation as to the opening of the depositions. It is stipulated that the Court shall open the depositions designated?

MR. SYME:

Your Honor, Mr. Hirsch has offered certain depositions—

THE COURT:

That is right.

MR. SYME:

—in evidence.

MR. HIRSCH:

Yes, only the ones I named.

MR. SYME:

That has been stipulated to on the record, I am almost sure of that.

THE COURT:

Well, it is also stipulated they shall be separated from the remaining—

MR. SYME:

That is right.

THE COURT:

—depositions by the Court or the Clerk. You will have to let the Clerk know, gentlemen, you will have to let the Clerk know which ones are to be separated from the others.

MR. HIRSCH:

I have given the list, Judge, to Mr. Rodabaugh. He can give him that list.

THE COURT:

All right, gentlemen, I think we are ready.

(The following excerpts from the minutes of regular membership meetings of Branch 1 appear in Exhibit P-22:

"September 11, 1937:

Report of William Leader:

My next suggestion is to do away with the kitchen immediately. Now that all the strikes are being conducted on the outside, I do not believe it is a practical thing from a financial end to keep this kitchen going. Strikers that picket do not always eat at the same time as their fellow striker such as they do during sit-down strikes. I believe a satisfactory solution would be to estimate the cost of food alone that is given to strikers during a weeks period and add this amount to their strike benefits, thus removing unnecessary overhead."

The following excerpts from the minutes of regular meetings of the executive board of Branch 1 appear in Exhibit P-22:

"April 13, 1937:

"Moved and seconded that the President of the Branch have the power to call such strikes in open shops as he sees fit. CARRIED.

"May 4, 1937:

"Moved and seconded that President Leader be given power to call a strike in the Apex Shop whenever he sees fit. CARRIED.")

Plaintiff Rests

Defendants Rest

Evidence Closed

(Mr. Hirsch argued the plaintiff's case to the jury.)

During his address to the jury Mr. Hirsch said:

And after that mob swept through and after Beirmeister had had his jaw broken, and it had to be wired; and he still can't eat hard food, and after Gobel, the other gentleman there (indicating), had five ribs broken, eighteen days in the Episcopal Hospital, Beirmeister, three weeks in the Episcopal Hospital, beaten down by that mob—who? Philco workers? What did they have against Beirmeister and Gobel?"

MR. SYME:

Your Honor, I object to this. I didn't want to interrupt Mr. Hirsch, but this is certainly immaterial and irrelevant—

MR. HIRSCH:

Oh—

MR. SYME:

—to the case and prejudicial to the jury. Your Honor, I am going to ask for the withdrawal of a juror.

MR. HIRSCH:

This is evidence, sir, that is before you.

MR. SYME:

That is not the issue in the case. Mr. Hirsch knows it.

MR. HIRSCH:

It is an issue, if Your Honor please, in the case,—

MR. SYME:

It is not an issue in the case—

MR. HIRSCH:

—to show the method that was used by this defendant union—

THE COURT:

Well, the jury will understand that no element of damages is involved in the personal injury to various people on the premises at the time. That is not a matter that you will consider in fixing the damages. You will only consider it because it is evidence in the case as going to make up the general history of what occurred at that time. You won't consider it for any other purpose and you won't allow it to prejudice you or to cause you to depart from what is the real issue in the case.

With that caution I would suggest that counsel does not spend too much time on that phase. It is merely an incident of what occurred on May 6th. No one is to be held in damages for that particular item of injury. If the parties who were injured were suing here as plaintiffs it would be a different question, but they are not plaintiffs in the case. The only plaintiff here is the Apex Hosiery Company.

(Mr. Hirsch continued to argue the plaintiff's case to the jury.)

(Recess 12:35 until 2 o'clock P. M.)

After Recess

Present: Counsel as before noted.

(Mr. Hirsch continued to argue the plaintiff's case to the jury.)

(Mr. Syme argued the defendants' case to the jury.)

(Mr. Hirsch argued to the jury in rebuttal.)

THE COURT:

Well, members of the jury, I don't think that I will ask you to come back tomorrow. Over the week-end please remember what I said to you about not talking about the case, and in addition to that, don't try to make up your minds about it, and don't try to arrive at any conclusion until you have heard the charge that the Court is bound to give you under the law. Be back here at ten o'clock on Monday morning.

You can adjourn court. Now, gentlemen, have you got your points for charge?

Adjourned to Monday, April 3, 1939, at ten o'clock A. M.

Before:

HON. WILLIAM H. KIRKPATRICK, J., and a Jury

Philadelphia, Pa., April 3, 1939

THE COURT:

Juror number 1, the foreman, has suffered a loss in his family and has asked to be excused. The parties have agreed that he shall be excused and that number 2 alternate shall take his place.

CHARGE OF THE COURT

KIRKPATRICK, J.

Members of the Jury:

It is, I am sure, needless for me to begin my charge by telling you that, in arriving at a verdict in this case, you must be guided solely by the evidence that you have heard in this case and the law as the Court will give it to you, and that you must disregard arguments addressed to you as to what may or may not be the effect of this case upon other cases or upon the cause of labor or upon the cause of employers, and that you must lay aside your individual feelings and your individual social or economic ideas and simply address yourselves to a determination of the facts in this case. If I should elaborate too much on that you could very properly answer to me that judges have been just as great offenders in that respect as anyone else; and so we will all try

to do our duty in that regard and to stick to the facts of this case and decide them solely upon the evidence as it has been presented.

You are the sole judges of the facts of the case. That is your function in the machinery of court administration. By your verdict you are to report what you think happened, as a matter of fact. I am going to review some of the facts in a very general way. Counsel have reviewed them carefully and very adequately. If I mention any particular fact or any part of the evidence in charging you, that does not mean that I do not think you should consider other things, or that I think that those things are more important than many things that I may not have an opportunity to mention. The whole evidence is before you, and you will consider everything that you have heard. Do not limit yourselves merely to such things as I may advert to in speaking to you.

This is a civil suit for damages, and the burden of proof is upon the plaintiff throughout to establish all the fact issues to your satisfaction by the weight of the evidence. There are a number of defendants here. There is a labor union, and there are four individuals who are defendants. The greater part of my charge will be devoted to the questions involving the responsibility and liability of the labor union, and then when you have determined those questions you will take up the matter of the individual defendants as I will explain to you, but if I talk about the union throughout it does not mean that the union is the only defendant, it is merely a matter of convenience so that we won't have to mention the whole list of defendants every time.

This is, as I said, a civil action for damages, and it is based upon a law passed by Congress in 1890, which is commonly known as the Sherman Anti-Trust Law. That is the only ground upon which the case properly comes into this court. The Sherman Anti-Trust Law provides that every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States is declared to be illegal. This plaintiff in this case charges that the defendants conspired to violate the act which I have just quoted to you. The act further provides that any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor, and then it goes on to say that the damages which he recovers shall be trebled; that is, multiplied by three. Now, you have nothing to do with that part of it. What you are to find is whether there was liability or responsibility on the part of these defendants, and if so, what the actual amount of damages was. Counsel has referred to the treble damage feature, but just dismiss that part of it from your minds altogether. It would not be fair, it would not be proper, for you to increase or decrease the actual damages by reason of the fact that the law has a provision in it for trebling the damages. You will find the actual amount of damages if you come to that question and if you find a verdict for the plaintiff.

It is necessary in a case under the Sherman Act to show or to prove that there was an intent, on the part of the defendants who are sued, to restrain interstate commerce. The facts involved in this case have been ruled upon by the Circuit Court of Ap-

peals in that regard, and the law as declared by the Circuit Court of Appeals requires me to say to you that if you find that the defendants did the things which they are charged with doing, then, without further proof of their intent, you may find from those facts that the defendants did intend to restrain interstate commerce.

You have as evidence of that fact the testimony to the effect that the plaintiff's business was largely an interstate business. I think the testimony was that eighty per cent of the goods that were manufactured there were shipped in interstate commerce, that there were on hand at the time of the sit-down strike some twenty-five thousand dozen of finished goods and one hundred and four thousand dozen of goods unfinished—that is, undyed, or, as they call it, in the greige—making a total of one hundred and twenty-nine thousand dozen actually manufactured of hosiery, and that there were orders on hand at that time amounting to over a million dollars—nearly a million and a half dollars—and that eighty per cent of all of that business was interstate business. That is evidence from which, under the ruling of the Circuit Court of Appeals, you may find—I am going to leave it to you to say—but you may find that there was a restraint, an intended restraint, of interstate commerce on the part of the persons, whoever they were, who caused the plant to close down and stop production.

The claim of the plaintiff in this case is based really upon two things. It is based upon a sit-down strike, and I may say that certain damages are alleged to have arisen from the mere seizure and closing down of the plaintiff's plant, and then dam-

ages are also claimed as a result of destruction, physical damage, to the plaintiff's physical property, plant, equipment and machinery. I think the logical way for you to begin to consider your verdict would be to take the sit-down strike and determine whether under the rules that I give you the union is responsible for the sit-down strike, and then we will take up the question of the physical damage to the property after that.

Of course, there is no dispute about the fact that there was a sit-down strike and that the plant of the plaintiff was occupied, without its consent, by some two hundred and fifty men, to the entire exclusion of the plaintiff (except so far as the sit-downers were willing to allow certain employees to come in,) for a period beginning on May 6th, 1937 and ending on June 23, 1937. There is no dispute about that fact. There is also no dispute that the sit-down strike, as a matter of law was not only illegal, but was criminal, under the law of Pennsylvania. The Circuit Court of Appeals so decided. I do not think any court in the country has ever, so far as I know, ruled that a sit-down strike was legal. So that those two things are established without further discussion.

Now, that brings us to the question of whether the union is responsible for or liable for the sit-down strike, and the law on that point is this. It has been clearly declared by Congress that no labor union—I am not giving the exact words—can be held liable for or responsible for an unlawful act or the unlawful acts of any of its members or officers except upon clear proof of actual participation in or actual authorization of such acts, or of ratifi-

cation of such acts after actual knowledge thereof. That is a correct statement of the law, and that is what you must have in mind when you approach this question. The mere fact that certain members of a union may perform unlawful acts for or on behalf of their union is not sufficient to impose liability upon the union. That is, you cannot say, "Some of these men were union men, and, therefore, we don't need any more evidence, we are satisfied that the union is responsible." You must find actual authorization or ratification of their acts on the part of the union after knowledge. And it is also true that, even though the union benefited by the unlawful acts of some of its members, that does not warrant the conclusion that the union either authorized or ratified the unlawful acts complained of. There must be clear proof of actual authorization or ratification.

So, let us take up the evidence very briefly and see whether the union did authorize, or rather authorize or ratify—because the evidence dovetails on those two points—and see whether there is evidence here of actual authorization or ratification after actual knowledge of the sit-down strike. Remember, I am talking about the seizure and occupation of the mill, not about the physical damage that was done to the property. That we will take up later on.

I may say that this is an issue which is disputed. The defendants' position is that there was no authorization of a sit-down strike. The defendant agrees that a strike was authorized, but the defendants' position and argument is that the sit-down strike was not intended, was not authorized, was not ratified by the union, that it occurred spontaneously, unexpectedly, and that it was the act of certain in-

dividual persons, some of whom may have been members of the union, and that, therefore, the union is not responsible for it. That is the defendants' position.

To begin with, let's see what official action by the union we have. It is proved by the minutes of the executive committee or the executive body of the union that on May 4, 1937—that is, two days before the plant was entered—it was moved and seconded that President Leader be given power to call a strike in the Apex shop whenever he sees fit. That was carried. That was the executive board of the defendant union. It is not specified in that resolution that the strike was to be a sit-down strike.

We now turn to the other evidence in the case, the background, the circumstances surrounding, to see whether it was understood and intended when that resolution was put into effect that President Leader was to be given authority to call a sit-down strike, and that a sit-down strike and not an ordinary, lawful strike, was what was really intended and what was really understood was going to be done.

The plaintiff's evidence shows, if you accept it, that during the early part of 1937 there was a general campaign by this union to obtain closed shop contracts in all the hosiery mills in Philadelphia, and that that campaign involved a large number of mills. Secondly, in the course of that campaign there were twenty, twenty-one or twenty-two sit-down strikes which actually took place, and that they all led to or were connected with the effort of the union to obtain closed shop contracts in the mills in which they took place. Now, it is not disputed that that is what happened, but it is disputed that

sit-down strikes were called, and Mr. Leader testified that he did not call sit-down strikes. The testimony on that point is this:

"Q. And in those cases"—referring to the other twenty or twenty-one strikes in hosiery mills in Philadelphia—"the strike that took place happened to be a sit-down strike?"

"A. (By Mr. Leader) I would say in most cases that what is commonly classed as a sit-down strike come about. We would declare the strike, not a sit-down strike."

Nevertheless that is part of the background which you must consider.

And, thirdly, the plaintiff's evidence shows that during all this period of unionization or an effort to unionize there was a strike kitchen maintained by the union at the union expense and that, not only in the Apex case but in the case of other sit-down strikes, food was supplied from the union kitchen at union expense to the sit-down strikers. The total cost, as I have it—and remember if I misstate any facts or give you any figures that do not accord with your recollection, it is your recollection that governs, and not my statement—I may make mistakes—but as I have it, the union actually paid to maintain that strike kitchen during this entire period some twenty-three thousand dollars. And Mr. Leader testified—and I am again quoting from his testimony, because I don't want to state anything unfairly—"I knew that they supplied food to people in the—where the permission was given for it." He is referring to the other sit-down strikes. He said, also, that that entire amount did not go to sit-down

strikers, but that that food was also expended for relief of unemployed members of the union.

Fourth, the union maintained a supply of cots and blankets in its building somewhere—I don't remember just where—but they did have on hand during this period and they had on hand at the time that the Apex strike began a supply of cots and blankets which had cost them some twenty-seven hundred dollars—a large number of cots and blankets. As to that the plaintiff argues that it is all evidence that from the very beginning the union intended and anticipated that the campaign of unionization which included the Apex mill should be carried on, not through a series of ordinary, lawful strikes, but unlawful sit-down strikes. As to the cots and blankets Mr. Leader testified that they were “For someone to have something to sleep on where permission was given for the blankets or cots to be brought in.” He was asked then whether there were any other mills except the Apex where the proprietor or the owner asked to have these cots and blankets brought in, and he said: “I don't know of any mill owner with the exception of the Apex who asked me to bring any cots or blankets in.”

Another matter of evidence which the plaintiff points to and argues that it shows that the only intention throughout was the declaration of a sit-down strike was the minute or the excerpt from the minutes of the union of July 13th, after the strikers had left the mill. That excerpt quoted a report made by Mr. Leader—and it had to do with the strike kitchen—and in that report Mr. Leader is quoted by the union minutes as having said: “Now that

all strikes are being conducted on the outside", and then it went on to say that there was no use in maintaining the kitchen any more, indicating, as the plaintiff says, that the sole purpose of the maintenance of the kitchen was for the feeding of men who had seized mills in sit-down strikes. Mr. Leader denied that he had made that report, and you have to consider that. His position is that the minutes are in error in that respect, and it is for you to say whether you believe that he did make such a report or whether he did not. At any rate, it appears in the way I have stated it on the minutes of the meeting.

Now, all that that I have stated is what the plaintiff argues is the background and the circumstances which indicate that this resolution of May 4th was intended and directed to authorize a sit-down strike and no other kind of a strike.

In addition to that the plaintiff points to certain evidence that at the time the mob was milling about before the property Mr. Leader stood on the steps of the plant and said words to the effect, "I now declare a sit-down strike in the Apex plant." I think there were two witnesses who testified to the use of those words. Mr. Leader definitely and positively denied that he had used that expression or mentioned a sit-down strike, and you will remember what he said about what he did say, that he declared a strike and that he instructed his parties and his committee on their rights to picket, and so forth.

The plaintiff further points to evidence to the effect that Mr. Leader made a speech in the plant some short time after the mob had broken in, and that in that speech he organized and directed the

beginning of a sit-down strike by the men who afterward took part in it, and you will remember that Miss Dorwart said that he told them that they were just like soldiers in an army, and so forth. Again Mr. Leader denies that, and you will have to weigh the evidence as to whether he said that or not. It would all bear on the question.

Then there is evidence produced by the plaintiff indicating an apparent control and leadership on the part of Mr. Leader throughout the conduct of the sit-down strike, and that included one witness who testified that in Mr. Leader's presence he was introduced to someone—I have forgotten just who it was—as Mr. Leader, the man in charge of the sit-down strike, and that Mr. Leader did not object or dissent in any way from that introduction. Again, that testimony is denied by Mr. Leader, and you will have to make up your minds as to the credibility of the witnesses.

Then, finally, the plaintiff points to the fact that during the conduct of the strike, and particularly on May 6th, certain cards were presented to various persons by members of the union, and those cards contained an application for membership and this clause:

“I pledge myself if called upon to go on a sit-down strike with other workers of the Apex Silk Hosiery Co. to bring about full recognition of our demands and the Union.”

You will consider what both sides have said on the question of authorization, the evidence for and the evidence against, and you must determine whether or not in your opinion it has been clearly

proven that the union either authorized or ratified the sit-down strike as such.

With regard to the matter of ratification: you would consider the evidence on that point if you should find that there is not sufficient evidence of authorization, but it would be largely the same, in many points the same, evidence. In other words, the plaintiff argues that the payment of strike benefits to the men actually in possession of the plant, the sending of food in to them from the union strike kitchen, the payment of the benefits from the union treasury, and the sending of cots, and so forth, from the union storehouse, is all evidence of ratification of their actions by the union after knowledge of what they were doing; because it seems to me it can hardly be denied that, in view of the reports and so forth that were made, the union did not know or that the executive board of the union, or whoever was in a position to make the union responsible, did not know that the strike that was being conducted at the Apex plant was actually a sit-down strike.

Now, all that has to do with the question of the responsibility or the liability of the union for the sit-down strike. If you come to the conclusion that the union was not responsible or liable for that sit-down you would have no further to go. If, on the other hand, you come to the conclusion that the union was, within the rules that I have given you, responsible and liable, if you come to the conclusion that they did actually authorize the strike or did ratify it after actual knowledge, then you would come to the question of what damages flowed from the suspension of the plaintiff's operations or business made necessary or enforced by the seizure of

its plant. Again, I am leaving out of the question the physical damage to the plant and we are to address ourselves, now, solely to the question: What did the plaintiff lose by reason of the fact that its business was totally suspended from May 6th to June 23rd, inclusive?

The plaintiff's claim is that it is entitled to loss of profits which it would have made during that period. That, the courts have said, is a proper element of damage to consider in cases where the defendant is responsible for the total suspension and shutting down or stoppage of the plaintiff's business. And they have further said that that is not the kind of thing that can be proved—and it is not expected that it must be proved—with absolute mathematical accuracy. Of course, a jury cannot guess at a thing of that kind, but it is sufficient if there is a sound basis given the jury from which they can estimate with reasonable accuracy and approximate reasonably the amount of profits which would have been made and which were therefore lost to the plaintiff during or by reason of the shut-down.

The plaintiff gives you a basis from which you can consider that question. The basis which the plaintiff offers is the experience of the business for the five months immediately preceding, that is, from January 1st to May 6th, and the plaintiff's argument is that unless it appears that there is some definite change or something that occurred to make the period after May 6th different from the period before, then it is to be assumed, and you can properly find, that the business would have continued in the same way, and that the plaintiff would have

earned the same profits during that period that were earned the five months before.

The plaintiff has produced evidence to show that during that five months period the total net sales made by the plaintiff—and by net sales I presume is meant the sales less goods that are returned, that is, the actual sales—were two million, two hundred and forty-five thousand dollars in money, and that that represented four hundred and five thousand dozen of hosiery. When you get that down to a question of profit, the plaintiff has produced evidence to show that they made a profit per dozen of twenty-seven cents, per dollars of sales of 4.8, approximately, cents, and a profit per week of \$6,111; and the plaintiff argues that you can take that figure and say that for the number of weeks which it was compelled to suspend operations it would be entitled to damages of \$6,111 per week, and that it would be also entitled to damages thereafter for such loss of business as resulted from the closure of the plant during those weeks. In connection with that the plaintiff points out and argues to you that those months of June and July are a peak period, that really the plaintiff does most of its business in so far as selling goes in two periods of the year, in June and July and in November and December, and that is when it sends its salesmen out and takes the greater part of its orders, and, therefore, the plaintiff argues and suggests that a shut-down during that period, when it was impossible to take orders because of the fact that they didn't know when they were going to be able to operate again, would inflict a much greater loss of profits than merely for the five weeks during which the plant was shut down. That is a mat-

ter that you will have to take into consideration and see how far that loss extends. The plaintiff also showed that for the seven months—for the eight months; I have said five months and it is four months, isn't it? It is four months. Well, you will remember that—for the following eight months, beginning May 6th, and ending at the end of the year, the total business done by the plaintiff was a million and a half dollars in sales, and that is somewhat more than half but less than two-thirds of the business during the four months when it was allowed to operate, and that the amount of hosiery delivered, sold, during that period was two hundred and seventy-five thousand dozen, that is, in eight months, as against four hundred and five thousand dozen in four months when they were able to operate fully. The plaintiff says that that is an indication of the fact that the result of this sit-down carried over far beyond the mere period of five weeks or so when they were actually closed down. That is all for you to say, and you will have to apply your judgment to that.

The defendants, on the other hand, point out several matters which they say you must consider and which they argue indicate that this estimated profit which the plaintiff would have made is far too high. And, by the way, I may say that during the balance of the year, from May 6th to the end of the year, the plaintiff shows no profit whatever, so there is nothing to be subtracted as against whatever figure you find the plaintiff would have been expected to make. The defendants say that there are several considerations that indicate that the plaintiff's expectations are not justified by the facts, and that you

have no right to and should not find anything like the full amount of damages which the plaintiff claims for loss of profits.

In the first place, the defendants put in evidence not only the four months preceding this shut-down period, but the four years, and that shows that in 1933 the plaintiff incurred a loss of \$344,000., in 1934 the plaintiff incurred a loss of \$372,000., in 1935 the plaintiff incurred a loss of \$149,000., and that in the whole year of 1936 there was a profit of only sixty-eight thousand dollars. Those are the figures as I have them. I hope that I haven't got them wrong. To June 30, 1936 there was a loss of one hundred and eighty-six thousand dollars. So that he says that in view of that record you have no right to presume that the business of the plaintiff would have continued during the balance of 1937 at the profit that was made during the first part of the year. Well, that is all matter for you to consider.

The plaintiff's answer to that is that they had gone through a period of depression, that the business was just getting out of it, that business was just getting good, and that there was no reason to anticipate that it would not remain good, at least for the balance of the year.

But in reply to that, again, the defendants have introduced evidence showing the condition of the business as a whole, and they argue from it that beginning some time in the fall of 1937 there was a sharp, clearly marked depression in the hosiery business, that the plaintiff could not, in view of that fact, be expected to do the same amount of business or earn the same profits as it had during

the early part of the year. In support of that, the defendants produced a brief which the plaintiff along with other manufacturers filed with a labor tribunal in an effort to get a reduction of wages. You can consider that, because that brief does indicate—or the chart filed with it does indicate—that the plaintiff was asking for a wage reduction, and basing its argument upon the fact that business was falling off rapidly during the latter part of the year.

Now, the plaintiff says that would not have affected this question, because that only had to do with orders taken in the latter part of the year, and that if it had been able to take its orders during June and July its business, whatever the rest of the industry might have felt, would have been just as good during the end period of 1937 as it was in the beginning period. That is all evidence that you must consider.

In order to find these profits you must be satisfied to what extent the business of the plaintiff during the balance of the year, or beginning with May 6th, would have held up. If you think that it would have held up as well as it did in the early part of the year, and if you think that his estimate of his business during the first part of the year was fair and accurate, then you would be entitled to give him the damages which he claims as a result of lost profits. Those several considerations have all got to be weighed carefully, and you will have to find some figure, provided you find liability for the sit-down strike.

I may say that there are two other items which

would arise, independent of the question of damage to property, which you also should give the plaintiff, or, at least, so much of them as you think he is entitled to as a result of the sit-down strike, regardless of the destruction of the property. First there is an item claimed for loss on seasonable merchandise. The plaintiff claims four thousand dollars as a result of that; that is, goods which were manufactured for that particular season and could not be sold otherwise. Also, the plaintiff claims for loss on certain elastic webbing which had to be returned, of twenty-five hundred and some dollars.

The plaintiff's claim for loss of profits amounts to ninety-one thousand dollars, in round figures, during the actual period of the shut-down, during the fifteen-week period from May 6th to August 19th, and then also an estimated loss of one hundred and sixteen thousand dollars during the balance of the year. The figures I am giving you are just his claim. They will go out with you in the form of a calculation. You are not bound by that in any way. They simply indicate what the plaintiff is here saying he is entitled to. It is for you and me to determine what he actually is entitled to and whether this is a proper claim or not.

Now we come to the question of damage arising from loss of property, and that item I am going to divide into two parts. Now, you will remember that, during the sit-down strike certain knitting machinery was injured, I believe on—what was the first date?

MR. HIRSCH:

June 10th.

THE COURT:

I believe on June 10th there were, roughly, some thirty machines smashed and damaged, and then on June 22nd, the day before the sit-down strikers left the plant there were some two hundred—

MR. HIRSCH:

104.

THE COURT:

Oh, 104 more machines smashed and damaged. Now, let us take that last item first. I am leaving the damage that occurred on the 6th of May until last. Let's take the damage arising during the sit-down strike. During that period the evidence shows, if you accept it, that the mill was entirely in the control of the sit-down strikers, that the locks on the doors had been changed, that no one was allowed to come in without their permission, and no one was allowed to go out without a pass from the person who was in control of the "sit-downers," so-called, and that, generally speaking, they were in complete possession and control of the plant. The plaintiff argues from that that you may find that that damage was done by some of the sit-downers. Now, you have heard the evidence for and against that. It was suggested that the damage might have been done, at least the damage of June 10th might have been done by some of the watchmen whom the sit-downers did permit to go through. But it appears that after June 10th these watchmen were followed by members of the sit-

down strike, and that they were followed with weapons, so that they had control not only of the plant but of the movements of all of the plaintiff's employees who were permitted to come in, and there weren't very many of them. So you first have to determine whether you are satisfied that that injury was done by somebody who was a member of the sit-down strike committee, or body, or whatever you choose to call it, and then, again, you come back to this question of authorization.

Now, it is a little different proposition to say that the union authorized the damage to the machinery that took place during the sit-down strike from saying that it authorized the sit-down strike; so that, from the mere fact that you may find, if you do, that the union authorized the sit-down strike it does not necessarily follow that they authorized the damage which was done. And there the only rule I can give you is this, that when a man, or a body, or an organization, authorizes an unlawful act—and the sit-down strike was an unlawful act—it will be presumed to be responsible for and to have authorized, actually authorized, such incidents of that unlawful act as human experience would tell would naturally follow as a probable consequence in the course of the doing of that unlawful act. Now, there, you have to make another fact finding. You would have to determine whether you think—assuming that you find the union authorized the sit-down strike—that it could be and must be contemplated and understood that there was a likelihood and a probability that damage would be done to property after the seizure of the plant. That is a question that you will have to give your best

thought to. On the one hand the union counsel point out very properly that it was not part of the authorized and accepted technique of sit-down strikes to destroy property, that those men expected to work with the machines, and that their only object was to force the employer by a suspension of his business to grant their demands, and that then after that was done they were just as anxious to go ahead and do business as he was, and that it is unreasonable and out of line with the whole idea of sit-down strikes, unlawful as they were, nevertheless out of line with that idea to find that the union intended or authorized the destruction of property.

But there is something else to consider there, and that is this. First, if the union did put some two hundred and fifty young fellows in complete possession of somebody else's property—delicate machinery—could not they expect, or should not they expect, that there would be disorder, that they might not be able to be controlled, and that damage would happen? That is a question for you to answer, whether that is a probable, natural incident of that particular kind of thing. And then, when we talk about the technique of the sit-down strike, we must remember another thing. It is a consideration for you to say whether the thing that made sit-downs effective, the thing that enabled a few sit-down strikers to hold a big plant against the employer, was not the very threat that if violent measures were taken to eject them property would be destroyed. Was or was not that involved in the very idea of a sit-down strike? Not necessarily with this, now, I am talking generally about

sit-down strikes, but it is all to be taken in consideration in view of the defendants' argument that destruction of property was entirely contrary to the idea of a sit-down strike—not that they intended destruction of property, but there was a weapon which they placed in the hands of the sit-down strikers, a threat, a possibility that property would be destroyed if there was an attempt by force to eject the men who had seized the mill. Now, all that has to do with the arguments addressed to you by counsel and should be considered by you.

The fact question for you to determine is whether the union actually authorized this destruction of property by the men who did it. I do not think there is evidence to show that they ratified it if they did not authorize it. I do not think that the union was compelled or bound to dismiss from its membership all these sit-downers, unless they knew who actually had done that damage, in order to free itself of liability. But the important question is whether the authorization of the sit-down strike involved as a natural consequence, a necessary consequence, an incident, destruction of property. If it did, then the union is responsible for that item of damage, which amounts to, as the Master has found—and that is the only evidence before you, his report, and you can accept that, if you wish, in the absence of any contradiction—that amounts to \$82,644.59.

Then we come to the other item of physical damage. You will remember throughout all this the burden of proof is upon the plaintiff to establish its contention by the weight of the evidence. The other item is the physical damage done to the

plant and the equipment—there was no damage to machinery at this time—on the 6th of May. There, again, you have to determine whether there was an actual authorization or ratification of that damage. It is, again, a different question from either of the two I have given you. There is not a bit of evidence in the case that any member of the union—as far as I know—committed any damage on that day. There is evidence that a large mob broke into the plant and that a great deal of damage was done; and the only question to consider there is whether Mr. Leader's declaration, if he made that declaration, of a sit-down strike, standing outside of the mill, when it is well known that a sit-down strike is conducted inside a mill, was a command or an invitation or an authorization to the mob to break in, and whether his statement was authorized by the union, because even an officer is in the same position as a member, and unless his acts, his unlawful acts, are authorized or ratified the union is not responsible for them. So that you must consider that in connection with the argument which the plaintiff makes that these other mills and this mob were let out, and this mob was really in a sense created by the union for this very purpose, at least, to have it there as a threat and a menace and to enable it to carry out its purpose. You must find actual authorization by the union. If you do so find, then you would be entitled to add to the damages the sum of \$26,490.12 which took place on the 6th of May.

There is one further item of damage, and this has to do with union responsibility for the shut-down of the plant during the period from May 6th to

June 23rd, and thereafter from June 23rd to August 19th. During that last period it was shut down by reason of the destruction of the machinery. They did not start operating until the 19th, but the plaintiff was in possession of its plant on the 23rd of June. That item consists of overhead expenses, fixed charges, carrying charges, salaries, and so forth, and the plaintiff says that those expenses it had to pay anyhow, as long as it was going to stay in business it had to keep its organization together—there were certain charges that just had to be paid—and during the period that it was unable to transact any business, that was all dead loss, all that payment. There was nothing coming in, it was all going out, and there was nothing being produced and no benefit to the plaintiff by reason of these overhead expenses, these basic expenditures that were necessary in order to keep the plant going. So you can take that item of \$110,967 and allow as much of it as you see fit, or you can apportion it between the period of May 6th to June 23rd if you find the union only responsible for the sit-down strike, or you can allow it for the period of May 6th to August 19th if you find the union responsible for both the sit-down strike and the damage to machinery.

Now, that covers, I think, the entire case. I am going to submit the case to you in this way, members of the jury. I am sending out a number of written questions to which you can write the answers. They follow along very closely upon what I have charged and I think they are clear enough. I do not think they need explanation. They have to do with exactly the questions I have given you, very much in the order I have given you, asking you whether the union authorized the seizure of the

plant and occupation of it, the sit-down strike, and if so, what the damage from that was; and then whether they authorized the damage to the machinery, and if so, what the damage to that was. Then on a separate sheet I have given you simply a guide for your general verdict. You do not need to write out the answers to that. You will render your verdict generally, and I have said on this separate sheet: "Is your verdict for the plaintiff or for the defendants? If your verdict is for the plaintiff, do you find a verdict against (a) The American Federation of Full Fashioned Hosiery Workers, Philadelphia Branch No. 1, Local No. 706? (b) William Leader? (c) Joseph Burge? (e) Harry Ohemig? (e) Huey Brown? Answer 'yes' or 'no' as to each." That is, you can come to that determination, and then "If your verdict is for the plaintiff what do you find to be the total amount of the plaintiff's damages?", and that should be the sum of the written figures which you will give me for damages, but you don't need to write this out, you can report this. It is simply as a guide.

I haven't said anything about the individual defendants in this case, and I do not propose to say very much. The general rules that apply to the union apply to them. It must appear that those individuals participated in some way in the illegal acts which took place, and it must appear that they are responsible for and took part in the sit-down strike, that is, not necessarily as sit-downers, but that they directed or counselled or had an active part in the sit-down strike and in the destruction of property to hold them responsible for that damage. In other words, you can answer these questions first, if you wish, and then you will find a general

verdict and come to this conclusion, "Is your verdict for the plaintiff or for the defendants?" Now, if it is for the plaintiff, you will tell me when you come into court against which defendants your verdict is. You may find against all the defendants; you may find against any of them. Then you will tell me how much your verdict is, and that would be the sum of all the damages which you find for the plaintiff.

The defendants have submitted a number of points and asked me to charge upon them. Some of them I have already covered.

The first point is denied and not read.

The second point is denied and not read.

The third point I have already charged you upon, in the very language requested.

The fourth point is denied and not read.

The fifth point is denied and not read.

The sixth point is a correct point. An officer of a labor union is not authorized merely by virtue of his office to make the Union a party to an unlawful conspiracy. That all goes to this question that I stated of actual authorization.

The seventh, eighth and ninth points I have already covered in my charge and they do not need to be answered.

The tenth point I believe I partially at least affirmed in the course of my charge, and I don't think it is necessary to answer. In other words, I charged you that failure to discharge the sit-down strikers is not in itself evidence of ratification of

their acts, but I did charge you that you might consider the support and maintenance of the sit-down strikers while in the plant as evidence of ratification.

The eleventh point is denied and not read.

The twelfth point has been covered, I think, fully in the charge and it does not need to be answered.

The thirteenth point is denied. It is correct as stated, exactly as stated; there is no evidence—it is true that it does not appear that anyone but William Leader had actual knowledge of the fact that the Apex Company had a hundred thousand dozen of hosiery finished and ready to be shipped out of the State of Pennsylvania. That is true, but you may find from the membership of the union and the fact of the familiarity of its officers with the hosiery business that the union did have knowledge of the fact that the Apex Hosiery Company was generally engaged in interstate commerce.

The fourteenth, fifteenth, sixteenth and seventeenth points are all denied and not read.

Now, gentlemen, is there anything further that either of you wish me to say to this jury which I may have omitted?

MR. HIRSCH:

Yes. Taking the last first, as to Leader's knowledge of the unfilled orders on hand and the finished merchandise on hand, the testimony given by Mr. Leader was, as I recall it, that he reported back to the executive committee of the union or to the union all of the conferences that he had.

THE COURT:

Well, that is a question of fact that you will have to determine. Actually, I don't know, I still think there is no evidence as to the exact amount, but—

MR. HIRSCH:

All right; and, secondly, I take exception to Your Honor's statement as to ratification, although you in looking over the points for charge that were handed up to you cleared up the one point so that I am not quite sure as to how you stand. In other words, after the June 10th damage, when the union continued to supply food and sustenance and strike benefits, with knowledge of the June 10th damage, I say that amounted to ratification, and likewise—

THE COURT:

I don't think so,—

MR. HIRSCH:

—the strike payments afterwards—

THE COURT:

I don't think so, and I will allow you an exception, because it was not indicated, nobody yet, as far as I know, knows exactly who did that damage. There is a fair amount of evidence that it was done by some of the sit-down strikers, but as to who did it—Oh, I don't think the union is required to dismiss the entire body of men,—

MR. HIRSCH:

Well, I will take an exception.

THE COURT:

—but the evidence of authorization is still to

be considered. It is not important whether you divide with a sharp line between the two.

MR. HIRSCH:

And I also ask that an exception be noted on the record to your affirmance of the points—

THE COURT:

Yes.

MR. HIRSCH:

—for charge—

THE COURT:

Very well.

MR. HIRSCH:

—of the defendants.

MR. KATZ:

Excuse me, what did Your Honor—

MR. HIRSCH:

And I would like a copy of those points. I haven't seen them yet.

THE COURT:

Well, I have read most of them—

MR. HIRSCH:

All right.

THE COURT:

—to the jury.

MR. KATZ:

Now, if Your Honor pleases, I ask for an exception generally to the charge,—

THE COURT:

That cannot be granted.

MR. KATZ:

—and follow it with specific exceptions.

THE COURT:

; Well, all right, the specific exceptions are all right.

MR. KATZ:

First, our exception is to that portion of Your Honor's charge where you relied upon the decision of the Third Circuit Court in this case heretofore, on the ground that that decision has been obliterated by the ruling of the Supreme Court of the United States.

THE COURT:

I understand the point.

MR. KATZ:

Secondly, that even if the Third Circuit Court's decision is binding upon the Court you have withdrawn from the jury the question of intention, upon which we are entitled to a jury finding.

THE COURT:

I didn't intend to do that. I don't think the effect of my charge was that, but I allow you the exception, and we can work that out.

MR. KATZ:

I object to that portion of Your Honor's charge where you failed to charge on the meaning of restraint of interstate commerce and the requirement that there must be an undue and unreasonable restraint within the meaning of the Sherman Act, as defined by the Supreme Court's decisions heretofore.

THE COURT:

All right. I might say that you have not submitted a general point—Oh, yes, you have,—

MR. KATZ:

Yes.

THE COURT:

—the first one; well, that is all right.

MR. KATZ:

And the second point, too.

THE COURT:

It is denied, and that is all that is necessary.

MR. KATZ:

Now, I object to Your Honor's submission to the jury of the fact question as to whether or not the plaintiff in this case lost any profits, on the ground that there has been no proper basis laid by the plaintiff from which the jury could make a proper inference of loss of profits.

I object also to the rule of law laid down by which Your Honor did not state to the jury that there can be no recovery of anticipated profits unless there is a long-established business which shows that it has been a profitable business for a specific period of time in advance of the interruption.

THE COURT:

Well, that statement that Mr. Katz just made is correct, but it is for you to determine whether the basis given by the plaintiff here of four months, and as modified by the earlier four years given by the defendants, is a sufficient basis from which profits could be determined—

MR. KATZ:

May I object, Your Honor, to the explanation?

THE COURT:

—as a satisfactory basis—yes, sir.

MR. KATZ:

It is my point, sir,—

THE COURT:

All right, I will allow you an exception to that.

MR. KATZ:

Yes, sir. I object to Your Honor's failure to point out to the jury that the rate of profit would remain constant, in that you did not show to them that there was a deficiency operation of only 22.88 per cent, which of itself would show that they were not deprived of the possibility of getting business during that time, at least to that extent.

THE COURT:

Well, that is evidence in the case, as Mr. Katz has just stated, which you may consider. It is proper for you to consider that point that he has just made.

MR. KATZ:

Now, with reference to physical damage, there is one portion of Your Honor's charge which is not specific on Section 6, and that is with reference to the destruction of machinery. I object, therefore, to that portion of Your Honor's charge.

THE COURT:

Oh, it should have been. I intended it to be; that as to all that physical damage the same

rule as to authorization and ratification applies that I gave you in regard to the sit-down strike. There must be proof, clear proof.

MR. KATZ:

That is it.

THE COURT: 6

There must be clear proof of actual authorization or there must be clear proof of the ratification after actual knowledge. If I did not say that it was a mere oversight.

MR. KATZ:

Yes, and I object to that portion—

MR. HIRSCH:

Or participation, sir.

THE COURT:

Or participation.

MR. KATZ:

I object to that portion of Your Honor's charge where you permit the jury to indulge in a presumption of authorization,—

THE COURT:

All right.

MR. KATZ:

—because that is a denial of the clear proof doctrine.

THE COURT:

By "presumption" I mean inference, of course.

MR. KATZ:

Or inference. I object to Your Honor's fail-

ure to charge the jury with reference to the item of depreciation which is included in the one hundred and ten thousand dollars as overhead.

THE COURT:

We talked about that before. I think it is all right to submit it as it is. I will allow you that exception.

MR. KATZ:

Will Your Honor indulge me a moment—

THE COURT:

Yes.

MR. KATZ:

—while I confer with my associates?

May I assume Your Honor has allowed an exception to the disaffirmance of those points which Your Honor did not read to the jury?

THE COURT:

Yes, sir.

MR. KATZ:

That is all.

MR. HIRSCH:

May I ask one further charge,—

THE COURT:

Yes.

MR. HIRSCH:

—that in Your Honor's charge you have spoken of "authorization" and "ratification", and you have not equally stressed the word "participation" as outlined in the act, and I ask—

THE COURT:

Well, I don't believe it means very much more. You will understand that the act also uses the word "participation", but I don't believe it means very much more than either "authorization" or "ratification", when you speak of a labor union. A labor union cannot participate as such; it either authorizes or ratifies its agents or its employees or its officers to do things.

MR. HIRSCH:

I submit, sir, that when they supplied, continued to supply cots and blankets and strike benefits, that they participated in the sit-down strike.

THE COURT:

Well, it may have been authorization or it may be evidence of authorization, or it may have been ratification, and I don't know that you gain very much. I will let that stand as I have given it.

Now, members of the jury, here is the plaintiff's calculation, which, as I told you, is not evidence, and is merely indicative of what the plaintiff claims. Here are just instructions for your general verdict. You will come in and render your general verdict orally. You will say whether you find for the plaintiff or the defendants. If you find for the plaintiff, you will say against what defendants, and how much, and then in addition to that you will hand up written answers to the numbered questions. That is clear, isn't it, to everybody?

If you want copies of these questions I have them here.

MR. HIRSCH:

The exhibits will go out after the jury retires, as Mr. Rodebaugh says?

THE COURT:

That will be all right. These are my questions. You will find they follow my charge very closely.

The other alternate juror is discharged with the thanks of the Court.

(The jury retired at 11:30 o'clock A. M.)

*Motion for Directed Verdict
for Defendants*

(The defendants submitted the following motion for a directed verdict for defendants:

**"MOTION FOR A DIRECTED VERDICT
FOR DEFENDANTS**

Under Rule 50 (b) the defendants move that the Court direct the jury to find a verdict in favor of all of the defendants on the following grounds:

A. This Court has no jurisdiction of the cause of action because there has been no violation of the provisions of the Sherman Anti-Trust Act.

B. The evidence does not establish a conspiracy with the purpose or intent, on the part of the defendants or any of them, to restrain or control the supply of women's full fashioned hosiery entering or moving in interstate commerce, or the price of it in interstate markets, or to monopolize the supply, control the price or discriminate as between would-be purchasers, or to accomplish an undue and unreasonable restraint in the article; nor can such intent be presumed from the evidence in the case. Mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce.

*Motion for Directed Verdict
for Defendants*

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C. That there is no clear proof that the defendants or any of them actually participated in a conspiracy to restrain interstate commerce.

D. That there is no clear proof of actual participation in, or actual authorization of the acts complained of in this cause or of ratification of such acts after actual knowledge thereof, by the defendants.

/s/ ISADORE KATZ,

/s/ M. HERBERT SYME,

/s/ BENJ. R. SIMONS,

Attorneys for Defendants."

The defendants submitted the following points for charge:

"DEFENDANTS' POINTS FOR CHARGE"

The learned Trial Judge is respectfully requested to charge the jury in the above entitled case as follows:

1. Under all the evidence in the case, and the law pertaining thereto, your verdict must be in favor of all of the defendants and against the plaintiff.

2. Your verdict must be in favor of all of the defendants because the evidence does not establish a conspiracy with the purpose or intent, on the part of the defendants or any of them, to restrain or control the supply of women's full fashioned hosiery entering or moving in interstate commerce, or the price of it in interstate markets, or to monopolize the supply, control the price or discriminate as between would-be purchasers, or to accomplish an undue and unreasonable restraint in the article; nor can such intent be presumed from the evidence in the case. Mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce.

3. You cannot find any one of the defend-

12. Even if you find that the defendants named in this case, or some of them, intended to secure a union contract, between Union and Plaintiff, you cannot find that there was a conspiracy to restrain interstate commerce merely because their acts to secure the union contract prevented the plaintiff from manufacturing and shipping hosiery in interstate commerce.

13. Under all the evidence in this case, it does not appear that any one but William Leader had knowledge of the fact that the Apex Company had 100,000 dozens of hosiery finished and ready to be shipped outside of the State of Pennsylvania. There is no evidence that the Union knew of this fact or denied permission to Apex Company to remove such finished merchandise or intended to or in fact prevented the removal of such finished merchandise from the plant.

14. I charge you that you cannot find that there was a conspiracy to restrain interstate commerce of hosiery amongst the defendants because there is no evidence that any defendant but William Leader knew that the Apex Hosiery Company shipped merchandise outside the State of Pennsylvania.

15. The jury is instructed that there can be no ratification of acts which are in violation of the criminal statutes or of the public policy of the state or nation, and upon this principle, I instruct you that you cannot find ratification by the Union of the alleged illegal conspiracy or any unlawful acts of destruction or damage.

16. The Plaintiff in this case cannot recover for the alleged loss of anticipated profits from May 6, 1937.

17. The plaintiff cannot recover the item of depreciation of machines and buildings as an item of overhead.

Respectfully submitted,

/s/ ISADORE KATZ,

/s/ BENJ. R. SIMONS,

/s/ M. HERBERT SYME,

Attorneys for Defendants."

The following list of questions to be answered orally was submitted to the jury:

"Is your verdict for the plaintiff or for the defendants?"

If your verdict is for the plaintiff, do you find a verdict against

(a) The American Federation of Full Fashioned Hosiery Workers, Philadelphia Branch No. 1, Local No. 706?

(b) William Leader?

(c) Joseph Burgo?

(d) Harry Ohemig?

(e) Huey Brown?

Answer 'yes' or 'no' as to each:

If your verdict is for the plaintiff what do you find to be the total amount of the plaintiff's damages?"

ants in this case liable for damages resulting from any unlawful acts, except upon clear proof of actual participation in or actual authorization of *such acts* or of ratification of such acts after actual knowledge thereof.

4. The jury is instructed to find that there is no clear proof that the Union Defendant either actually participated in or actually authorized any destruction or damage to the plant, equipment or merchandise of the plaintiff which occurred on May 6, 1937, nor is there clear proof that the Union ratified such acts of destruction or damage after actual knowledge thereof.

5. The jury is instructed to find that there is no clear proof that the Union Defendant either actually participated in or actually authorized any destruction or damage to the plant, equipment or merchandise of the plaintiff which occurred between May 7, 1937 and June 23, 1937 inclusive, nor is there clear proof that the Union ratified such acts of destruction or damage after actual knowledge thereof.

6. An officer of a labor union is not authorized merely by virtue of his office to make the Union a party to an unlawful conspiracy.

7. The jury is instructed that even if it finds that there was a conspiracy by the defendants in this case to damage the property of the plaintiff, that still it cannot find the defendants liable for such destruction or damage unless it further finds that the plant, machines and merchandise were damaged with intent to restrain trade or interstate commerce of hosiery.

8. I hereby charge you that the mere fact that members of a union may perform unlawful acts for and on behalf of their union is not sufficient to impose liability upon the Union.

9. I hereby charge you that even though the Union benefited by the unlawful acts of some of its members, that this does not warrant the conclusion that the Union either authorized or ratified the unlawful acts complained of in this case.

10. I hereby instruct you that even though officers of the Union had knowledge of unlawful acts, but took no action, and even though the official paper of the Union carried reports of the Apex strike and activities, and even though the Union took no disciplinary action against such members who may have participated in unlawful acts, and even though the conduct of such individual members who participated in the unlawful acts benefited the Union, nevertheless, you cannot find a verdict against the Union for such unlawful acts by individual members or officers.

11. I charge you that even though you find that the Union authorized or ratified the sit-down strike at the plaintiff's plant, nevertheless you cannot impose liability upon the Union for the destruction or damage to the plant, merchandise and equipment because you cannot infer that the Union should have foreseen that such destruction and damage would be done by the persons engaged in the sit-down strike.

The following questions to be answered in writing were submitted to the jury:

"Did the Union actually authorize the seizure and occupation of the plaintiff's plant by the sit-down strikers?

2. Did the Union, after actual knowledge, ratify the seizure and occupation of the plant by the sit-down strikers?

3. If the answer to either Question 1 or Question 2, or both, is 'yes', then what amount of damage, if any, did the plaintiff suffer in loss of profits by reason of the fact that it was unable to carry on its normal business while the strikers were in possession of its plant?

4. Did the Union actually authorize the injury to knitting machinery, plant, equipment and merchandise which occurred between May 7th and June 23rd, inclusive?

5. Did the Union ratify after actual knowledge thereof the injury to knitting machinery, plant, equipment and merchandise which occurred between May 7th and June 23rd, inclusive?

6. If the answer to Question 4 or to Question 5, or to both, is 'yes', then what amount of physical damage (in dollars and cents) was done, during the period May 7th to June 23rd inclusive, to the plaintiff's knitting machinery, plant, equipment and merchandise?

7. Did the Union actually authorize the destruction of and damage to the physical prop-

erty and merchandise of the plaintiff which occurred on May 6th or any of the same?

8. Did the Union ratify after actual knowledge thereof the destruction of and damage to the physical property and merchandise of the plaintiff which occurred on May 6th, or any of the same?

9. If the answer to Question 7 or to Question 8, or to both, is 'yes', then what amount of physical damage (in dollars and cents) was done on May 6th, 1937 to the plaintiff's plant, equipment and merchandise?

10. Was the plaintiff compelled to make payments and incur expenses during the period May 6th to August 19, 1937 for all or any of the items referred to collectively during the trial as overhead expenses?

11. If the answer to the foregoing question is 'yes', then what was the total amount of damage suffered by the plaintiff by reason of such payments?

12. If the answer to Questions 4, 5, 7 and 8, or to any of them is 'yes', then what amount of damages, if any, did the plaintiff suffer in loss of profits by reason of the fact that it was unable to carry on its normal business after the strikers left the plant because of damage to its knitting machinery?

13. Did the plaintiff sustain a loss on seasonable merchandise by reason of the occupation of its plant by the sit-down strikers?

If your answer is 'yes', what was the amount of that loss?

14. Did the plaintiff sustain a loss on elastic webbing as a direct result of the occupation of its plant by the sit-down strikers?

If your answer is 'yes', what was the amount of that loss?

15. Did all or any of the individual defendants participate in, authorize or ratify the sit-down strike?

If less than all, name those who did.

16. Did all or any of the individual defendants participate in, authorize or ratify the damaging of the plaintiff's property on May 6th?

If less than all, name those who did?

17. Did all or any of the individual defendants participate in, authorize or ratify the damaging of the plaintiff's knitting machinery from May 7th to June 23rd, inclusive?

If less than all, name those who did?"

The following plaintiff's calculation of losses for which claim is made in this suit was submitted to the jury:

**"PLAINTIFF'S CALCULATION OF LOSSES
FOR WHICH CLAIM IS MADE IN THIS SUIT."**

Damage to plant, equipment and
merchandise on May 6, 1937 \$ 26,490.12

Damage to plant, machinery,
equipment and merchandise be-
tween May 7 and June 23, 1937 82,644.59

Overhead expenses, fixed charges,
carrying charges, salaries, etc.
during the period May 6, 1937 to
August 19, 1937 110,967.26

Loss of profits during fifteen
week period, May 6, 1937 to Au-
gust 19, 1937 (based on rate of
profit made during period of
January 1, to May 6, 1937, of
\$6,111.00 per week) 91,665.00

Loss of profits during nineteen
week period, August 19, 1937 to
December 31, 1937 (based on
rate of profit made during pe-
riod of January 1 to May 6,
1937, of \$6,111.00 per week) 116,109.11

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Loss on seasonable merchandise	4,125.00
Loss on elastic webbing	2,574.00

TOTAL	\$434,574.97")
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(The jury returned at 4:07 P. M. for further instructions.)

THE COURT:

Members of the jury, I have a question from you which I have submitted to counsel, requesting information as to whether or not it is necessary to answer all of the special interrogatories which I submitted in the form of questions, and my answer to it is that the Court will require you to answer all those questions. Is that clear?

(The jury retired).

(The jury returned at 5:15 P. M.)

THE CLERK:

Foreman, please rise. Members of the jury, have you agreed upon your verdict?

JUROR NO. 1:

Yes, sir.

THE CLERK:

You have answered the interrogatories?

JUROR NO. 1:

Yes.

THE CLERK:

How do you then find, for the plaintiff or for the defendants?

JUROR NO. 1:

We find for the plaintiff.

THE CLERK:

How do you assess the damages?

JUROR NO. 1:

Damages, \$237,310.85.

THE CLERK:

Against which defendants?

JUROR NO. 1:

Against the American Federation of Full-Fashioned Hosiery Workers, Philadelphia Branch No. 1, Local No. 706, and William Leader.

THE CLERK:

And as to the other three defendants you find for the defendants?

JUROR NO. 1:

That is right.

THE COURT:

Have you answered all the questions?

JUROR NO. 1:

Yes, sir.

THE COURT:

Now, just let me go over that.

THE CLERK:

Members of the jury, hearken unto your verdict as the Court hath recorded it. In the

matter wherein Apex Hosiery Company is plaintiff and the American Federation of Full Fashioned Hosiery Workers, Philadelphia Branch No. 1, Local No. 706 and William Leader are defendants, you find for the plaintiff and assess the damages against both defendants in the sum of \$237,310.85. As to the defendants, Joseph Burge, Harry Oehmig and Huey Brown you find for the defendants.

JUROR NO. 1:

That is right.

THE CLERK:

So say you all.

THE COURT:

Now, I have the answers to the interrogatories, which I will just read for the purpose of the record.

The answer to the first question is "Yes."

The answer to the second is "Yes."

The answer to the third question is "\$24,000."

The answer to the fourth question is "Yes."

The answer to the fifth question is "Yes."

The answer to the sixth question is "\$82,644.59."

The answer to the seventh question is "No."

The answer to the eighth question is "No."

The answer to the ninth question is the word "None," which is the same as not answering.

To the tenth question the answer is "Yes,"

with the exception of salaries from which we deducted \$8000."

The answer to the eleventh question "\$102,967.26."

The answer to the twelfth question is "\$21,000."

The answer to the thirteenth question is "\$4125."

The answer to the fourteenth question is "Yes," and the amount is given as \$2574.

The answer to the fifteenth question is "Yes," and the answer to the second part of that question is "William Leader."

The answer to the sixteenth question is "No."

The answer to the seventeenth question is "Yes," to the first part, and to the second part the answer is "William Leader."

Those answers appear to the Court to be consistent with each other and with the general verdict.

MR. HIRSCH:

May I have the answer to number 11 just for my own record, Judge Kirkpatrick?

THE COURT:

Number 11?

MR. HIRSCH:

Yes.

THE COURT:

\$102,967.26.

MR. HIRSCH:

And may I have the answer to—oh, that is all right. Thank you.

THE COURT:

All right. Members of the jury, you are now discharged with the thanks of the Court for having performed a difficult and an arduous duty and in an intelligent manner.

MR. HIRSCH:

May I thank the members of the jury?

MR. SIMONS:

May I extend the thanks on behalf of the defendants? I know you have had quite a task and it has been a difficult one. We appreciate your indulgence.

MR. HIRSCH:

Pardon me, Judge Kirkpatrick, before the jury is dismissed I move that the verdict of the jury be entered in triple amount in accordance with the provisions of the Sherman Act, the total amount of which will be \$711,932.55.

THE COURT:

Yes, well, the Court grants the motion and makes the entry.

(The jury returned written answers to the questions as follows:

"1. Did the Union actually authorize the seizure and occupation of the plaintiff's plant by the sit-down strikers?

Yes.

2. Did the Union, after actual knowledge, ratify the seizure and occupation of the plant by the sit-down strikers?

Yes.

3. If the answer to either Question 1 or Question 2, or both, is 'yes,' then what amount of damage, if any, did the plaintiff suffer in loss of profits by reason of the fact that it was unable to carry on its normal business while the strikers were in possession of its plant?

\$24,000.

4. Did the Union actually authorize the injury to knitting machinery, plant, equipment and merchandise which occurred between May 7th and June 23rd, inclusive?

Yes.

5. Did the Union ratify after actual knowledge thereof the injury to knitting machinery, plant, equipment and merchandise which occurred between May 7th and June 23rd, inclusive?

Yes.

6. If the answer to Question 4 or to Question 5, or to both, is 'yes,' then what amount of physical damage (in dollars and cents) was done, during the period May 7th to June 23rd inclusive, to the plaintiff's knitting machinery, plant, equipment and merchandise?

\$82,644.59.

7. Did the Union actually authorize the destruction of ~~and~~ damage to the physical property and merchandise of the plaintiff which occurred on May 6th, or any of the same?

No.

8. Did the Union ratify after actual knowledge thereof the destruction of and damage to the physical property and merchandise of the plaintiff which occurred on May 6th, or any of the same?

No.

9. If the answer to Question 7 or to Question 8, or to both, is 'yes,' then what amount of physical damage (in dollars and cents) was done on May 6th, 1937 to the plaintiff's plant, equipment and merchandise?

None.

*10. Was the plaintiff compelled to make payments and incur expenses during the period May 6th to August 19th, 1937 for all or any of the items referred to collectively during the trial as overhead expenses?

Yes, with the exception of salaries from which we deducted \$8000.

11. If the answer to the foregoing question is 'yes,' then what was the total amount of damage suffered by the plaintiff by reason of such payments?

Charge of the Court

12. If the answer to Questions 4, 5, 7 and 8, or to any of them is 'yes,' then what amount of damages, if any, did the plaintiff suffer in loss of profits by reason of the fact that it was unable to carry on its normal business after the strikers left the plant because of damage to its knitting machinery?

\$21,000.

13. Did the plaintiff sustain a loss on seasonable merchandise by reason of the occupation of its plant by the sit-down strikers?

Yes.

If the answer is 'yes,' what was the amount of that loss?

\$4125.

14. Did the plaintiff sustain a loss on elastic webbing as a direct result of the occupation of its plant by the sit-down strikers?

Yes.

If your answer is 'yes,' what was the amount of that loss?

\$2574.

15. Did all or any of the individual defendants participate in, authorize or ratify the sit-down strike?

Yes.

If less than all, name those who did.

Wm. Leader.

16. Did all or any of the individual defendants participate in, authorize or ratify the damaging of the plaintiff's property on May 6th?

No.

If less than all, name those who did?

17. Did all or any of the individual defendants participate in, authorize or ratify the damaging of the plaintiff's knitting machinery from May 7th to June 23rd, inclusive?

Yes.

If less than all, name those who did?

Wm. Leader.")

VERDICT

(The jury returned a verdict for the plaintiff and against the defendants American Federation of Full Fashioned Hosiery Workers, Philadelphia Branch No. 1, Local No. 706, and William Leader in the amount of \$237,310.85.)

JUDGMENT

(Filed April 4th, 1939)

Before KIRKPATRICK, J.

AND NOW, to wit: April 4, 1939, in accordance with the verdict and the direction of the Court, Judgment is hereby entered in favor of Plaintiff, Apex Hosiery Company, and against the defendants The American Federation of Full Fashioned Hosiery Workers, Philadelphia Branch No. 1, Local No. 706, and William Leader, in the sum of Seven hundred Eleven thousand Nine hundred Thirty-two and 55/100 (\$711,932.55) together with counsel fees in the sum of Twenty-five thousand (\$25,000.00) Dollars, and costs to be taxed; and Judgment is hereby entered in favor of the defendants Joseph Burge, Harry Ohmeig and Huey Brown, and against the plaintiff, Apex Hosiery Company, for their costs to be taxed.

By the Court:

Attest: GILBERT W. LUDWIG,
Deputy Clerk.

**MOTION TO SET ASIDE VERDICT AND JUDG-
MENT AGAINST WILLIAM LEADER AND
AMERICAN FEDERATION OF HOSIERY
WORKERS, BRANCH NO. 1, LOCAL 706**

(Filed April 14, 1939)

AND NOW, to wit, this 13th day of April, 1939, the defendants, William Leader and American Federation of Hosiery Workers, Branch No. 1, Local 706, having moved for a directed verdict on behalf of all the defendants at the close of the evidence offered by the plaintiff, Apex Hosiery Company, and having assigned reasons therefor, which motion was denied; and having moved for a directed verdict for all of the defendants at the close of all the evidence, which motion was also denied; and having presented a point for binding instructions, which point was denied; come now by their Attorneys Isadore Katz, M. Herbert Syme, and Benjamin R. Simons, Esqs., and move to have the verdict and any judgment entered thereon against them set aside and to have judgment entered in accordance with their motion for a directed verdict.

M. HERBERT SYME,

ISADORE KATZ,

BENJ. R. SIMONS,

*Attorneys for William
Leader and American
Federation of Hosiery
Workers, Branch No. 1,
Local 706.*

MOTION AND REASONS FOR NEW TRIAL

(Filed April 18, 1939)

To the Honorable the Judges of Said Court:

AND NOW, to wit, this day of April 1939, come the defendants, William Leader and the American Federation of Full Fashioned Hosiery Workers, Branch No. 1, Local 706, by their attorneys, M. Herbert Syme, Benjamin R. Simons, and Isadore Katz, Esqs., and move the court for a new trial as to them and assign in support thereof the following reasons:

1. The verdict is against the law.
2. The verdict is against the evidence.
3. The verdict is against the weight of the evidence.
4. The Honorable Court erred in charging the jury as follows:

“It is necessary in a case under the Sherman Act to show or to prove that there was an intent, on the part of the defendants who are sued, to restrain interstate commerce. The facts involved in this case have been ruled upon by the Circuit Court of Appeals in that regard, and the law as declared by the Circuit Court of Appeals requires me to say to you that if you find that the defendants did the things which they are charged with doing, then, without further proof

of their intent, you may find from those facts that the defendants did intend to restrain interstate commerce." (Page 5 of Charge) N. T. 1390

5. That the court failed to charge the jury on the meaning of the term "restraint of interstate commerce" as defined by the decisions of our Supreme Court of the United States interpreting the Sherman Act. (N. T. 1427)

6. The Honorable Court erred in failing to charge the jury that in order that there should be a restraint of interstate commerce within the meaning of the Sherman Act, it must be determined to be an undue and unreasonable restraint of the flow of that commodity in interstate commerce causing a diminution in the supply thereof or the control of the price of said product. (N. T. 1427)

7. The court has erred in failing to charge the jury that in construing the Sherman Act, the Supreme Court has consistently held to the view that as applied to labor combination in order to constitute a violation of the act, there must appear something more than the mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production.

8. The Honorable Court erred in failing to charge the jury that there must be present the purpose or intent to restrain or control the supply entering and moving in interstate commerce or the price of it in interstate markets or to monopolize

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the supply, control the price or discriminate between would-be purchasers.

9. The Honorable Court erred in withdrawing from the jury the question of the intention of the defendants to restrain interstate commerce. (N. T. 1391) •

10. The Honorable Court erred in charging the jury:

“• • • the only rule I can give you is this, that when a man, or a body, or an organization, authorizes an unlawful act—and the sit-down strike was an unlawful act—it will be presumed to be responsible for and to have authorized, actually authorized, such incidents of that unlawful act as human experience would tell would naturally follow as a probable consequence in the course of the doing of that unlawful act.” (Page 29 of Charge) N. T. 1414

11. The Honorable Court erred in charging the jury that they may presume facts and inferences contrary to the requirements of Section 6 of the Norris-LaGuardia Act which states that there must be actual authorization of actual participation in, or ratification after actual knowledge thereof. (N. T. 1414 and 1415)

12. The Honorable Court erred in charging the jury:

“It is a consideration for you to say whether the thing that made sit-downs effective, the thing that enabled a few sit-down strikers to

hold a big plant against the employer, was not the very threat that if violent measures were taken to eject them property would be destroyed. Was or was not that involved in the very idea of a sit-down strike? Not necessarily with this, now, I am talking generally about sit-down strikes, but it is all to be taken in consideration in view of the defendants' argument that destruction of property was entirely contrary to the idea of a sit-down strike—not that they intended destruction of property; but there was a weapon which they placed in the hands of the sit-down strikers, a threat, a possibility that property would be destroyed if there was an attempt by force to eject the men who had seized the mill. Now, all that has to do with the argument addressed to you by counsel and should be considered by you." (N. T. 1415 and 1416)

13. The Honorable Court erred in failing to state to the jury that there can be no recovery of anticipated profits unless there is a long established business which shows that it has been a profitable one for a specific period of time in advance of the interruption. (N. T. 1428)

14. The Honorable Court erred in failing to charge the jury with respect to the item of depreciation included in the item of damage as overhead. (N. T. 1430)

15. The Honorable Court erred in failing to affirm the first point for charge presented by the defendant and erred in denying and not reading the

said point to the jury which point reads as follows:

"Under all the evidence in the case, and the law pertaining thereto, your verdict must be in favor of all of the defendants and against the plaintiff."

16. The Honorable Court erred in failing to affirm the second point for charge presented by the defendant and erred in denying and not reading the said point to the jury which point reads as follows:

"Your verdict must be in favor of all of the defendants because the evidence does not establish a conspiracy with the purpose or intent, on the part of the defendants or any of them, to restrain or control the supply of women's full fashioned hosiery entering or moving in interstate commerce, or the price of it in interstate markets, or to monopolize the supply, control the price or discriminate as between would-be purchasers, or to accomplish an undue and unreasonable restraint in the article; nor can such intent be presumed from the evidence in the case. Mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce."

17. The Honorable Court erred in failing to affirm the fourth point for charge presented by the defendant and erred in denying and not reading the

said point, to the jury which points reads as follows:

"The jury is instructed to find that there is no clear proof that the Union Defendant either actually participated in or actually authorized any destruction or damage to the plant, equipment or merchandise of the plaintiff which occurred on May 6, 1937, nor is there clear proof that the Union ratified such acts of destruction or damage after actual knowledge thereof."

18. The Honorable Court erred in failing to affirm the fifth point for charge presented by the defendant and erred in denying and not reading the said point to the jury which point reads as follows:

"The jury is instructed to find that there is no clear proof that the Union Defendant either actually participated in or actually authorized any destruction or damage to the plant, equipment or merchandise of the plaintiff which occurred between May 7, 1937, and June 23, 1937 inclusive, nor is there clear proof that the Union ratified such acts of destruction or damage after actual knowledge thereof."

19. The Honorable Court erred in failing to read the seventh point for charge presented which reads as follows:

"The jury is instructed that even if it finds that there was a conspiracy by the defendants in this case to damage the property of the plaintiff, that still it cannot find the defendants liable for such destruction or damage unless it further finds that the plant, machines

and merchandise were damaged with intent to restrain trade or interstate commerce of ho- siery."

20. The Honorable Court erred in failing to read the eighth point for charge presented which reads as follows:

"I hereby charge you that the mere fact that members of a union may perform unlawful acts for and on behalf of their union is sufficient to impose liability upon the Union."

21. The Honorable Court erred in failing to read the ninth point for charge presented which reads as follows:

"I hereby charge you that even though the Union benefited by the unlawful acts of some of its members, that this does not warrant the conclusion that the Union either authorized or ratified the unlawful acts complained of in this case."

22. The Honorable Court erred in failing to read the tenth point for charge submitted which is as follows:

"I hereby instruct you that even though officers of the Union had knowledge of unlawful acts, but took no action, and even though the official paper of the union carried reports of the Apex strike and activities, and even though the Union took no disciplinary action against such members who may have participated in unlawful acts, and even though the conduct of such individual members who participated

in the unlawful acts benefited the Union, nevertheless, you cannot find a verdict against the Union for such unlawful acts by individual members or officers."

23. The Honorable Court erred in failing to affirm the eleventh point for charge presented by the defendant and erred in denying and not reading the said point to the jury which point reads as follows:

"I charge you that even though you find that the union authorized or ratified the sit-down strike at the plaintiff's plant, nevertheless you cannot impose liability upon the Union for the destruction or damage to the plant, merchandise and equipment because you cannot infer that the Union should have foreseen that such destruction and damage would be done by the persons engaged in the sit-down strike."

24. The Honorable Court erred in failing to read the twelfth point presented which is as follows:

"Even if you find that the defendants named in this case, or some of them, intended to secure a union contract, between Union and Plaintiff, you cannot find that there was a conspiracy to restrain interstate commerce merely because their acts to secure the union contract prevents the plaintiff from manufacturing and shipping hosiery in interstate commerce."

25. The Honorable Court erred in failing to affirm the thirteenth point for charge presented by the defendant and erred in denying and not reading

the said point to the jury which point reads as follows:

"Under all the evidence in this case, it does not appear that any one but William Leader had knowledge of the fact that the Apex Company had 100,000 dozens of hosiery finished and ready to be shipped outside of the State of Pennsylvania. There is no evidence that the Union knew of this fact or denied permission to Apex Company to remove such finished merchandise or intended to or in fact prevented the removal of such finished merchandise from the plant."

26. The Honorable Court erred in failing to affirm the fourteenth point for charge presented by the defendant and erred in denying and not reading the said point to the jury which point reads as follows:

"I charge you that you cannot find that there was a conspiracy to restrain interstate commerce of hosiery amongst the defendants because there is no evidence that any defendant but William Leader knew that the Apex Hosiery Company shipped merchandise outside the State of Pennsylvania."

27. The Honorable Court erred in failing to affirm the fifteenth point for charge presented by the defendant and erred in denying and not reading the said point to the jury which point reads as follows:

"The jury is instructed that there can be no ratification of acts which are in violation of the criminal statutes or of the public policy of the

state or nation, and upon this principle, I instruct you that you cannot find ratification by the Union of the alleged illegal conspiracy or any unlawful acts of destruction or damage."

28. The Honorable Court erred in failing to affirm the sixteenth point for charge presented by the defendant and erred in denying and not reading the said point to the jury which point reads as follows:

"The plaintiff in this case cannot recover for the alleged loss of anticipated profits from May 6, 1937."

29. The Honorable Court erred in failing to affirm the seventeenth point for charge presented by the defendant and erred in denying and not reading the said point to the jury which point reads as follows:

"The plaintiff cannot recover the item of depreciation of machines and buildings as an item of overhead."

30. The Honorable Court erred in admitting testimony relating to the conversation between J. L. Milestone and members of his Shop Committee. (N. T. Pages 31 and 32)

31. The Honorable Court erred in denying the motion to strike out testimony of conversations held between J. L. Milestone and his Shop Committee. (N. T. Page 40)

32. The Honorable Court erred in admitting

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testimony of F. Weinhold and his Shop Committee.
(N. T. Page 43)

33. The Honorable Court erred in failing to strike out the testimony of F. Weinhold and the Shop Committee. (N. T. Page 45)

34. The Honorable Court erred in admitting and failing to strike out testimony of J. Friedland and his Shop Committee. (N. T. Page 50)

35. The Honorable Court erred in admitting into evidence testimony relating to a conference held between the American Federation of Hosiery Workers and the non-union manufacturers prior to May 6, 1938. (N. T. Pages 66 - 68)

36. The Honorable Court erred in admitting into evidence photographs not properly proven and a proper basis laid for their introduction into evidence. (N. T. Page 86)

37. The Court erred in admitting into evidence testimony of a conference held between the plaintiffs and the union subsequent to July 29, 1937. (N. T. Pages 109 and 110).

38. The Honorable Court erred in admitting into evidence numerous copies of the Hosiery Worker, a newspaper. (N. T. Page 361)

39. The Honorable Court erred in admitting into evidence conversations had between J. A. Harper and William Etter. (N. T. Pages 418 and 419)

40. The Honorable Court erred in admitting

testimony of J. A. Harper that he heard sounds of machines being smashed. (N. T. 434 and 435)

41. The Honorable Court erred in admitting the presentation of the proof of damages by the plaintiff in total sums without demanding proof to substantiate the items thereof and imposing the burden upon the defendant to disprove the figures of the plaintiff as presented. (Steeple's testimony Pages 8, 9, 10, 11, 12, 15, 16, 18, 23, 33, 34, 36, 37, 40, 47, 49, 50, 60, 63 and 66.) (N. T. Pages 485 to 543)

42. The Honorable Court erred in failing to strike out the testimony of Mr. Steeple as not being the proper basis for the determination of damages. (N. T. Page 74)

43. The Honorable Court erred in admitting into evidence improper testimony on the matter of interstate commerce by permitting Mr. Meyers to testify generally as to his business in interstate commerce. (N. T. Page 55)

44. The Honorable Court erred in permitting Mr. Steeple to testify as to the nature of the interstate business of the said company without substantiating the percentages thereof by the actual books and records of said company. (N. T. Pages 50, 51 and 52)

45. The Honorable Court erred in failing to dismiss the plaintiff's cause of action on the ground that the court was without jurisdiction, the plaintiff having failed to prove the case under the Sherman Act; and also on the ground that the require-

ments of Section 6 of the Norris-LaGuardia Act have not been met by the plaintiff in establishing liability upon the defendants herein. (N. T. 648 and 649)

46. The Court erred in failing to sustain the objection to questions by Mr. Hirsch as to the political tie-up between William Leader, one of the defendants, and Mayor Wilson, it being improper cross-examination and there being no substantiation of any such charges made. (N. T. 715)

47. The Honorable Court erred in failing to sustain an objection to reading an excerpt from a document not in evidence. (N. T. 718)

48. The Honorable Court erred in dismissing the motion for submission of the cause to arbitration in accordance with the provisions of Section 3 of the Act of February 12, 1925, 43 Statutes 83. (N. T. Page 899)

49. The Honorable Court erred in referring the matter of physical damages to a Master. (N. T. Page 967)

50. The Honorable Court erred in permitting the plaintiff to offer in evidence and to read to the jury the report of the Master on his findings on physical damage. (N. T. Page 977)

51. The Honorable Court erred in instructing the jury as follows:

“Under the Rules of Procedure, I instruct you that you may consider the Master’s report

as evidence of the amount of damages sustained by the plaintiff in this case. All right."

(N. T. Page 982)

52. The Honorable Court erred in permitting Mr. J. C. Langer, one of the plaintiff's witnesses to testify before the jury in the matter of damages by stating total sums of money claimed by the plaintiff as damages without presenting all the details thereof. (N. T. Page 992)

53. The Honorable Court erred in permitting J. C. Langer, plaintiff's witness, to testify over objection that he was not properly qualified to present for the consideration of the jury the items of damage claimed by the plaintiff. (N. T. Pages 1001 and 1002)

54. The Honorable Court erred in permitting said J. C. Langer to testify from the statement prepared by an accountant as to profits and losses covering the period from January 1, 1937 to May 6, 1937, when the evidence indicated that an inventory was considered but no physical inventory actually taken. (N. T. Page 1004)

55. The Honorable Court erred in permitting J. C. Langer to testify to the profits of the plaintiff's business from January 1, 1937, to May 6, 1937, merely by reading same from an audit made of the books of the company without proving the details thereof or showing that it flows from damage or unlawful acts committed by any of the defendants within the meaning of the Sherman Act. (N. T. 1004 and 1005)

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56. The Honorable Court erred in permitting said J. C. Langer to testify, over objection, to the total volume of sales for the period of January 1, 1937 to May 6, 1937. (N. T. Page 1006)

57. The Honorable Court erred in permitting the plaintiff to prove profits earned by merely considering the profits over a six month period and dividing it equally during that time. (N. T. Pages 1007 and 1008)

58. The Honorable Court erred in permitting J. C. Langer to testify as to the volume of business done from May 6, 1937 to December 31, 1937, for the purpose of proving possible loss of profits. (N. T. Pages 1015 and 1019)

59. The Honorable Court erred in permitting J. C. Langer to testify and to admit into evidence his statement as to the amount of fixed charges allegedly paid by the company from May 6, 1937, to August 19, 1937. (N. T. 1020, 1021 and 1026)

60. The Honorable Court erred in refusing to strike from the record all of the testimony given by Mr. Langer. (N. T. Page 1032)

61. The Honorable Court erred in permitting said J. C. Langer to testify as to carrying charges incurred by the plaintiff from August 19, 1937, to December 31, 1937, in an attempt to allocate same as between the business done and that which should have been done. (N. T. Page 1034 and 1035)

62. The Honorable Court erred in refusing to strike out the testimony as to the alleged item of

overhead during the period from August 19, 1937 to December 31, 1937, as being merely conjectural and not with sufficient certainty for consideration by the jury. (N. T. Pages 1039, 1040 and 1042)

63. The Honorable Court erred in refusing to strike from the record among the items of expense presented to the jury as overhead, the charge for superintendent's salaries. (N. T. Page 1044)

64. The Honorable Court erred in refusing to strike out from the record every item presented as overhead expense by the plaintiff and alleged to be chargeable to the defendant. (N. T. Page 1044)

65. The Honorable Court erred in refusing to strike from the record the item of factory supervision charged as overhead. (N. T. Page 1050)

66. The Honorable Court erred in refusing to strike from the record the item of depreciation on machinery charged by the plaintiff as an item of overhead expense and attributing same as an item of damage for which they sought reimbursement. (N. T. Pages 1060, 1073 and 1079)

67. The Honorable Court erred in refusing to strike from the record the item of depreciation on real estate charged by the plaintiff as an item of overhead expense and attributing same as an item of damage for which they sought reimbursement. (N. T. Page 1079)

68. The Court erred in refusing to strike from the record testimony as to insurance charges al-

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leged as an item of overhead and presented as an item of damage alleged to be chargeable to the plaintiff. (N. T. Pages 1092, 1094, 1098 and 1099)

69. The Honorable Court erred in refusing to strike from the record an item of salesmen's expense for the New York office which the plaintiff presented as an item of overhead chargeable to the defendants in this case. (N. T. Pages 1125 and 1126)

70. The Honorable Court erred in refusing to strike from the record an item of office expense for the New York office which the plaintiff presented as an item of overhead chargeable to the defendants in this case. (N. T. Page 1127)

71. The Honorable Court erred in refusing to strike from the record the item representing office salaries included as overhead. (N. T. Page 1131)

72. The Honorable Court erred in refusing the defendant the right to examine the general ledger in an effort to prove the accuracy of the amounts and to test the credibility of J. C. Langer. (N. T. Pages 1143, 1144 and 1145)

73. The Honorable Court erred in refusing to strike from the record the item of dues and assessments charged as overhead and alleged to be part of the damages claimed by the plaintiff. (N. T. 1151, 1153 and 1154)

74. The Honorable Court erred in refusing to strike from the record the item of Pennsylvania Corporation Stock Tax from the overhead charges

as an item of damages claimed by the plaintiff. (N. T. Page 1160)

75. The Honorable Court erred in refusing to strike from the record the item of reserve for Federal and Pennsylvania taxes from the overhead charges as an item of damage claimed by the plaintiff. (N. T. 1167)

76. The Honorable Court erred in refusing to strike from the record the item of Social Security Taxes from the overhead charges as an item of damage claimed by the plaintiff. (N. T. Pages 1175 and 1176)

77. The Honorable Court erred in refusing to strike from the record the item of salary of superintendents, from the overhead charges as an item of damage claimed by the plaintiff. (N. T. Page 1183)

78. The Honorable Court erred in refusing to strike from the record the item of salary of factory supervision from the overhead charges as an item of damage claimed by the plaintiff. (N. T. Page 1183)

79. The Honorable Court erred in refusing to strike from the record the item of salary of Mr. Meyers, president of the plaintiff company, from the overhead charges as an item of damage claimed by the plaintiff. (N. T. Page 1183)

80. The Honorable Court erred in refusing to strike from the record the item of heat, light and

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power from the overhead charges as an item of damage claimed by the plaintiff. (N. T. 1223)

81: The Honorable Court erred in failing to grant the defendant's motion for a directed verdict. (N. T. Page 1379)

M. HERBERT SYME,
ISADORE KATZ,
BENJ. R. SIMONS.

**OPINION SUR MOTION TO SET ASIDE THE
VERDICT AND JUDGMENT AND MOTION FOR
A NEW TRIAL**

(Filed April 24, 1939)

Before: KIRKPATRICK, J.

The defendants have presented a motion to set aside the verdict and judgment, and a motion for a new trial. The former raises the single question whether the evidence established a case of violation of the Sherman Anti-Trust Law.

When the sit-down strike at the Apex mill first came before this Court, upon proceedings for an injunction, I dismissed the bill, holding that, although the strike was in plain violation of the law of Pennsylvania, the case could not be brought within the scope of the Anti-Trust Law, because the only purpose on the part of the defendants proved was to force the plaintiff to accept the closed shop, and there was no evidence of any intent to restrain interstate commerce. The Circuit Court of Appeals reversed the decree and directed this Court to issue the injunction, which was done.

It will be noted that the Circuit Court of Appeals did more than merely rule that there was evidence in the case from which an intent to restrain interstate commerce could be found. If that had been the extent of the decision the case would have been returned to this Court to make a fact finding upon the point. Since it is unlikely that the Circuit Court of Appeals intended to find facts itself, its

decision can only mean that, as a matter of law, the requisite intent is conclusively presumed from the seizure of the plant by the defendants and the consequent stopping of production and shipment of goods.

If this ruling is binding upon me, it disposes not only of the motion to set aside the verdict and judgment, but also of the main reasons for the motion for a new trial; because, under it, I would have been justified in limiting the jury to the sole issue of authorization or ratification. As a matter of fact, I submitted the question of the defendants' intent as well—a course of which the plaintiff might have some reason to complain, but not the defendants.

The defendants now contend that the order which the Supreme Court of the United States made in disposing of the injunction proceedings had the effect of nullifying the decision of the Circuit Court of Appeals as a binding precedent, and that I am entirely free to decide these motions as though no such decision had ever been rendered. The order of the Supreme Court is as follows:

"Upon consideration of the return of the petitioners to the rule to show cause, the petition for writ of certiorari is granted, the decree of the Circuit Court of Appeals reversed, and the cause is remanded to the District Court with directions to vacate its decree and to dismiss the bill of complaint upon the ground that the cause is moot. *Browlow vs. Schwartz*, 261 U. S. 216, 217, 218; *Alejandrino vs. Quezon*, 271 U. S. 528, 535, 536; *Bracken vs. Securities & Exchange Comm'n*, 299 U. S. 504."

The point has been most ably and exhaustively argued by counsel upon both sides. There is no reason to discuss the question at length or to refer to the numerous decisions cited, because the problem relates solely to the duty of the District Court and will not arise in any subsequent proceedings in this case. It need only be said, therefore, that I do not think that the order of the Supreme Court was intended to affect the decision of the Circuit Court of Appeals as a controlling precedent for this Court, and that I believe that I am still bound to follow it.

It seems clear that the Supreme Court's order was merely a procedural device, to put an end to a permanent injunction in a case which the Court found itself without power to review. The question had become moot through a settlement of the strike, and it would not have been consonant with justice to leave the defendants under an injunction which could serve no present useful purpose and which might be used against them under unforeseeable conditions arising in the future, particularly as they had no opportunity to have it reviewed.

Accepting the decision of the Circuit Court of Appeals as binding upon me, I dismiss both motions.

ORDER

(Filed April 24, 1939)

AND NOW, to wit: April 24th, 1939, in accordance with an opinion this day filed, it is ORDERED that the motions of Defendants above named

(a) to set aside the verdict and the judgment entered thereon, and

(b) to grant a new trial

be and the same are hereby dismissed.

(Sgd.) W. H. KIRKPATRICK,
J.

**NOTICE OF APPEAL TO CIRCUIT COURT OF
APPEALS FOR THE THIRD CIRCUIT UNDER
RULE 73-B OF THE FEDERAL RULES OF
CIVIL PROCEDURE**

(Filed April 25, 1939)

Notice is hereby given that William Leader and American Federation of Full Fashioned Hosiery Workers, (sometimes known as American Federation of Hosiery Workers) Philadelphia, Branch No. 1, Local 706, defendants above named, hereby appeal to the Circuit Court of Appeals for the Third Circuit from the final judgment, costs and counsel fee entered on the jury verdict in this action on April 4, 1939. The said judgment reads as follows:

JUDGMENT

"Before Kirkpatrick, J.

"AND NOW, to wit: April 4, 1939, in accordance with the verdict and the direction of the Court JUDGMENT is hereby entered in favor of Plaintiff, Apex Hosiery Company, and against the defendants, The American Federation of Full Fashioned Hosiery Workers, Philadelphia Branch No. 1, Local No. 706, and William Leader, in the sum of Seven Hundred Eleven thousand Nine Hundred Thirty-two and 55/100 (\$711,932.55) together with counsel fees

*Notice of Appeal to Circuit
Court of Appeals*

in the sum of Twenty-five thousand (\$25,-
000.00) Dollars, and costs to be taxed;

By the Court:

Attest:/s/Gilbert W. Ludwig,
Deputy Clerk."

ISADORE KATZ.

For

ISADORE KATZ,

2319 N. Broad St.,
Phila., Pa.

M. HERBERT SYME, and

BENJAMIN R. SIMONS,

Market Street Nat'l Bank
Bldg., Phila., Pa.

*Attorneys for William Leader
and American Federation of
Full Fashioned Hosiery
Workers Branch No. 1,
Local No. 706.*

**DESIGNATION OF MATTER TO BE INCLUDED
IN RECORD ON APPEAL**

(Filed April 25, 1939)

To the Clerk of said Court:

Sir:

Kindly prepare transcript of the record in the above cause to be filed in the office of the Clerk of the Circuit Court of Appeals for the Third Circuit under the appeal heretofore taken, and include in the said transcript the following:

1. Relevant Docket Entries.
2. Second Amended Statement of Claim.
3. Affidavit of Defense of William Leader to Second Amended Statement of Claim.
4. Affidavit of Defense of American Federation of Full Fashioned Hosiery Workers, Philadelphia Branch No. 1, Local 706, to Second Amended Statement of Claim.
5. Stenographic Transcript of Trial Proceedings—March 13, 1939, to April 3, 1939, inc. (10 Volumes).
6. The Judgment against the above-named defendants.
7. The Motion to set aside the Verdict and Judgment.

*Designation of Matter to be
Included in Record on Appeal*

8. The Motion for New Trial.
9. The Opinion of the Trial Judge announcing dismissal of the motion to set aside the verdict and judgment, and to grant a new trial.
10. Order dismissing motions to set aside the verdict and judgment and to grant a new trial.
11. Notice of Appeal.
12. Designation of matter to be included in the Transcript on appeal.
13. Clerk's Certificate.
14. Plaintiff's Exhibits 2 to 8 inclusive, and Plaintiff's Exhibits 15, 18, 22 are not to be incorporated in the record, but may be handed up to the Court as physical exhibits at the time of argument.

(sgd) ISADORE KATZ,

*Attorney for Defendants-
Appellants.*

Approved:

(sgd) SYLVAN H. HIRSCH,

Attorney for Plaintiff-Appellee.

CERTIFICATE OF CLERK

United States of America,

Eastern District of Pennsylvania, ss.:

I, George Brodbeck, Clerk of the United States District Court in and for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and full copy of so much of the pleas and proceedings; in the case of Apex Hosiery Company, a Pennsylvania Corp., vs. William Leader, and American Federation of Full Fashioned Hosiery Workers (sometimes known as American Federation of Hosiery Workers), Philadelphia Branch No. 1, Local 706, an unincorporated association, et al., No. 19950 March Term, 1937; as per designation of record filed, a copy of which is hereto attached, the transcript of record in the above entitled cause is to include . . . now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Philadelphia, this 26th day of April, A. D. 1939.

GEORGE BRODBECK,
Clerk.

(Seal)

[fol. 1398] IN UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT, MARCH TERM, 1939

No. 7085

WILLIAM LEADER and AMERICAN FEDERATION OF FULL FASH-
IONED HOSIERY WORKERS (Sometimes Known as American
Federation of Hosiery Workers), Philadelphia, Branch
No. 1, Local 706, Defendants-Appellants,

vs.

APEX HOSIERY COMPANY, Plaintiff-Appellee

ORDER OF SUBMISSION

And afterwards, to wit, the 19th day of June, 1939, come
the parties aforesaid by their counsel aforesaid, and this
case being called for argument sur pleadings and briefs, be-
fore the Honorable John Biggs, Jr., Honorable Albert B.
Maris and Honorable William Clark, Circuit Judges, and
the Court not being fully advised in the premises, takes fur-
ther time for the consideration thereof.

And afterwards, to wit, on the 29th day of November,
1939, come the parties aforesaid by their counsel aforesaid,
and the Court, now being fully advised in the prem-
ises, renders the following decision:

[fol. 1399] IN UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT, MARCH TERM, 1939.

No. 7085

WILLIAM LEADER and AMERICAN FEDERATION OF FULL FASH-
IONED HOSIERY WORKERS (Sometimes Known as American
Federation of Hosiery Workers), Philadelphia, Branch
No. 1, Local 706, Defendants-Appellants,

v.

APEX HOSIERY COMPANY, a Pennsylvania Corporation,
Plaintiff-Appellee

Appeal from the District Court of the United States for
the Eastern District of Pennsylvania

OPINION—Filed November 29, 1939

Before Biggs, Maris and Clark, Circuit Judges

Biggs, Circuit Judge:

Apex Hosiery Company, a Pennsylvania corporation,
brought suit in the court below naming as defendants Amer-

ican Federation of Full Fashioned Hosiery Workers, Philadelphia Branch No. 1, Local No. 706, an unincorporated association, Leader, its president, Burge, its vice-president, Omeig, its treasurer, and Brown, its secretary, and the members of the Union, alleging violation of the antitrust laws of the United States. The amended complaint alleged [fol. 1399-1] that jurisdiction was vested in the court below by virtue of Section 4 of the Act of October 15, 1914, 38 Stat. 730;¹ (15 U. S. C. A. 15), known as the Clayton Act entitling a person injured in his business or property by acts forbidden by the antitrust laws to recover three-fold for damages sustained by him.

The facts of the controversy at bar are not in dispute. Apex Hosiery Company manufactures hosiery in its factory at Philadelphia, Pennsylvania, employs more than 2,500 persons and does an annual business of approximately \$5,000,000. It procures its raw materials, principally silk and cotton, from outside the State of Pennsylvania and ships over eighty percent of its completed merchandise across state lines. The Apex Company insisted upon maintaining an open shop. The appellant union made attempts to induce the company to enter into a closed shop contract. These attempts were unsuccessful.

In the middle of April, 1937, the union made further demands for a closed shop agreement. Nothing came of those demands. On May 4, 1937, the union authorized Leader to call a strike at the Apex plant. Only eight of the company's employees at this time were members of the Union. On May 6th, at about two o'clock in the afternoon, a mob of fifteen to twenty thousand persons, consisting of employees of other hosiery mills in Philadelphia which had been unionized, gathered outside the plant and Leader made a further demand for a closed shop agreement.

¹ "That any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

When this was refused Leader forthwith declared a sit-down strike and immediately acts of great violence were committed against the plant and employees of the company. [fol. 1399-2] The plant was seized by members of the mob, some of whom remained in control of the plant until June 23, 1937. All of the locks on the outer doors and entrances of the plant were changed and no one was permitted entrance to the premises except by leave of those in possession. At the time of the seizure, the Apex Company had on hand approximately 134,000 dozens of finished hosiery ready for shipment against unfilled orders, eighty percent of which were from customers outside the State of Pennsylvania. The company repeatedly requested permission to ship this hosiery from the plant, but this was refused. During the course of the sit-down strike machinery was wantonly demolished or damaged to the extent of many thousands of dollars. The usurpation of the company's rights in its own property and the demolition of machinery and equipment, were conducted without interference by those local authorities charged with enforcing law and order in the City of Philadelphia. These facts which are not open to dispute show the existence of the sit-down strike in its most aggravated and illegal form. Judicial condemnation of such tactics cannot be too severe. They serve the cause of labor badly indeed and the public good fares worse before such a display of lawlessness. We have already expressed our views in this regard in our opinion in *McNeely & Price Company v. National Labor Relations Board*, — F. (2d) — and need not repeat here the words there used. See *Labor Board v. Fansteel Corporation*, 306 U. S. 240, 255, 256.

The sit-down continued until the entry on an injunction decree by the court below on June 23, 1937, pursuant to the mandate of this court in the prior equity suit of *Apex Hosiery Co. v. Leader*, 90 F. 2d 155. Following this decree the sit-down strike came to an end and the premises were returned to the possession of the Apex Company.

The suit at bar followed. After extensive hearings the jury returned a general verdict against Leader and the union in the sum of \$237,210.85, but rendered a verdict in favor of Burge, Omeig, Brown and the individual members [fol. 1399-3] of the union. The verdict included damages for injury to machinery and equipment, fixed and carrying charges which were deemed necessary expenses for main-

taining the plant and loss of profits to the company during the period of the plant's occupancy by the strikers. The trial court trebled the amount of the verdict in accordance with Section 4 of the Clayton Act and entered judgment in triple amount. The appellants filed motions to set aside the verdict and judgment and moved for a new trial. These motions were denied by the trial judge and the present appeal was taken.

The fundamental questions raised by this appeal may be stated as follows. Was there or was there not a violation of the antitrust laws of the United States and was the damage suffered by the appellee the proximate result of such violation? We entertain no doubt that the appellants should be compelled in the appropriate forum to answer in damages to the appellee. The crux of the problem, however, is whether the appellee is entitled to recover treble damages under the Clayton Act in a district court of the United States or whether it must seek relief in the courts of the Commonwealth of Pennsylvania. In short, upon all the evidence presented are the appellees shown to have been guilty of an offense cognizable under the anti-trust laws or should the trial court have directed a verdict in their favor? The answer to these questions is to be found in the antitrust laws and in the applicable decisions construing and interpreting them.

The Provisions of the Sherman Act

The Sherman Act was approved July 2, 1890, 26 Stat. 209. Sections 1 and 2 of the Act (15 U. S. C. A. 1, 2) are, in part, as follows:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is hereby declared to be illegal • • •"

[fol. 1399-4] Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, • • •"

It will be seen that by its very terms the Act includes the activities of any and all organizations in restraint of trade and renders them illegal. Congress did not limit the

restraint imposed by the Act to business combinations. It included all combinations in restraint of trade within the purview of the Act. See *Loewe v. Lawler*, 208 U. S. 274; *Gompers v. Buck's Stove and Range Co.*, 221 U. S. 418; *United Mine Workers v. Coronado Coal Company*, 259 U. S. 344; *Coronado Coal Company v. United Mine Workers*, 268 U. S. 298; *Bedford Cut Stone Co. v. Journeymen Stonecutters Association*, 274 U. S. 37.

Following the widespread complaints of labor organizations that they had been subjected improperly to the provisions of the Sherman Act, the Clayton Act, 38 Stat. 730, was passed. Section 6 of that Act provided "That the labor of a human being is not a commodity or article of commerce." It also provided that nothing contained in the antitrust laws should " * * * be construed to forbid the existence and operation of labor * * * organizations, instituted for the purposes of mutual help, * * *". It was contended that the words employed indicated an intention on the part of Congress to remove labor from the operation of the antitrust laws, for obviously if labor is not an article of commerce it cannot be in commerce. But this contention was repudiated expressly in *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, in which the Supreme Court said (p. 469): "The Section [section 6] assumes the normal objects of a labor organization to be legitimate, and declares that nothing in the Antitrust Laws shall be construed to forbid the existence and operation of such organizations, or to forbid their members from lawfully [fol. 1399-5] carrying out their *legitimate* objects; and that such an organization shall not be held in itself—merely because of its existence and operation—to be an illegal combination or conspiracy in restraint of trade. But there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects, and engage in an actual combination or conspiracy in restraint of trade. And by no fair or permissible construction can it be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade, as defined by the Anti-trust laws."

While the relief granted in the Duplex case was by way of injunction against the offending unions and the suit at bar is for money damages, we cannot see how such a dis-

tion, viewed in the light of the decision of the Supreme Court in the cited case, would serve to remove the activities of the appellants from the purview of the Sherman Act. It follows therefore that if the record in the suit at bar will support the conclusion that the appellants engaged in a conspiracy in restraint of trade, Section 6 of the Clayton Act will not serve to remove their activities from the operation of the antitrust laws of the United States.

The Application of the Sherman Act to Business Combinations

The absolute terms of the Sherman Act were subjected early to judicial construction resulting in the so-called "rule of reason." In *Hopkins v. United States*, 171 U. S. 578, 592 the Supreme Court stated: "The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate . . . To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased would enlarge the application of the act far beyond the fair [fol. 1399-6] meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act." In *Anderson v. United States*, 171 U. S. 604, 615 the Supreme Court stated: "Where the subject matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but that it was entered into with the object of properly and fairly operating and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute . . ."

In *Standard Oil Company v. United States*, 221 U. S. 1, the United States had endeavored to dissolve that holding company which controlled a principal part of the oil industry. The Supreme Court stated at p. 66 of its opinion: "If the criterion by which it is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the rule of reason becomes the guide . . ."

The extent and intent of the interference with commerce considered against the background of social consequences, must furnish the criteria for the determination of whether or not a combination and its acts are within the scope of the Sherman Act. See *Appalachian Coals, Inc. v. United States*, 288 U. S. 344. In the cited case the parties to the combination controlled 74.4% of the production of coal in the Appalachian area and 11.96% of the production of bituminous coal east of the Mississippi River. Chief Justice Hughes, delivering the majority opinion of the Court stated, p. 359, "The purpose of the Sherman Anti-Trust Act is to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, to afford protection from the subversive or coercive influences of monopolistic endeavor. As a charter of freedom, the Act [for 1399-7] has a generality and adaptability comparable to that found to be desirable in constitutional provisions." The Chief Justice went on to say, p. 360, "The decisions establish, said this Court in *Nash v. United States*, 229 U. S. 373, 376, 'that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade.'" The Chief Justice also stated, p. 372, "Good intentions will not save a plan otherwise objectionable, but knowledge of actual intent is an aid in the interpretation of facts and prediction of consequences," citing *Chicago Board of Trade v. United States*, 246 U. S. 231, 238.

In the more recent case of *Sugar Institute, Inc. v. United States*, 297 U. S. 553, 600, Chief Justice Hughes found that the Sherman Act "• • • does not go into detailed definitions. Thus in applying its broad prohibitions, each case demands a close scrutiny of its own facts. Questions of reasonableness are necessarily questions of relation and degree. In the instant case, a fact of outstanding importance is the relative position of defendants in the sugar industry. We have noted that the fifteen refiners, represented in the Institute, refine practically all the imported raw sugar processed in this country. They supply from 70 to 80 per cent of the sugar consumed. Their refineries are in the East, South, and West, and their agreements and concerted action have a direct effect upon the entire sugar trade." The Supreme Court held that the agreement im-

posed unreasonable restraints and required the cessation of the practices complained of by the United States.

In short, in respect to business combinations the Supreme Court has held there must be shown intent to restrict competition by control of supply or fixing prices of the commodity or articles under circumstances where such domination substantially affects the market or industry, and [fol. 1399-8] therefore the price to the consumer; or such intent may be inferred from the effect of the combination upon interstate commerce.

The Application of the Sherman Act to Labor Combinations

The provisions of the Sherman Act were early applied to the activities of labor unions. The first case in this field is that of *Blindell v. Hagen*, 54 F. 40, in which it was held that the provisions of the Sherman Act curtailed the activities of the crew of a steamship who struck and prevented the hiring of a new crew. The court was dealing with a ship, an instrumentality of commerce and the comparatively small extent of the interference with commerce in general was not permitted to remove the activities of the strikers from the operation of the Sherman Act. The law was applied rigorously and literally. See also *Waterhouse v. Comer*, 55 F. 149.

The first decision of the Supreme Court applying the Sherman Act to the activities of labor organizations was *Loewe v. Lawler*, *supra*. In this case the American Federation of Labor had attempted to compel Loewe & Company, manufacturers of hats, to operate upon a closed shop basis. When this demand met with refusal, a strike ensued at the company's plant and a secondary boycott was inaugurated throughout the United States. Suit for damages was brought against the union and its individual members by the company as in the case at bar. The Supreme Court held that the secondary boycott was illegal and that the suit might be maintained against the individual members of the union. The ratio decidendi of *Hopkins v. United States*, *supra*, was emphasized by the appellees but the Supreme Court, having in mind the size of the combination, stated that the 9,000 members of the United Hatters of North America had acted in concert with the 1,400,000 members of the American Federation of Labor, compelling the great majority of the manufacturers of fur hats in the United [fol. 1399-9] States to unionize their plants. The Court

found that the hatters intended to interfere directly with interstate commerce by means of the secondary boycott and reversed the decision of the court below which had dismissed the complaint upon demurrer. After trial and judgment in favor of the company the case came before the Supreme Court for the second time and was decided upon the same principles of law. 235 U. S. 522.

In the case of *United Mine Workers v. Coronado Company*, 259 U. S. 344, known as the first *Coronado* case, the receiver for the company which controlled the *Coronado Coal Company* and other companies desired to operate the coal properties upon a non-union basis despite an agreement to the contrary with the *United Mine Workers*. A strike resulted attended by great violence by the parties to the controversy. The mine properties were greatly damaged. Suit was brought by the companies against the *United Mine Workers of America*, twenty-seven local unions and a number of individuals, charging them with a conspiracy to restrain interstate commerce in coal and with destruction of property. Treble damages were prayed for. The unions demurred to the complaint, in effect denying that the *Sherman Act* conferred jurisdiction upon the court. The District Court sustained the demurrer but was reversed by the Circuit Court of Appeals. A trial was had in which substantial damages were awarded, which were trebled. A further appeal was taken to the Circuit Court of Appeals which sustained the judgment. Thereupon the defendants appealed to the Supreme Court which held that though the local unions were responsible for the destructive actions of their members, none the less there was no proof that the unions had engaged in a conspiracy to monopolize or restrain interstate commerce in defiance of the *Sherman Act*.

Chief Justice Taft, delivering the unanimous opinion of the Supreme Court, stated, p. 408, "Obstruction to coal mining is not a direct obstruction to interstate commerce in coal, although it, of course, may affect it by reducing the [fol. 1399-10] amount of coal to be carried in that commerce. We have had occasion to consider the principles governing the validity of congressional restraint of such indirect obstructions to interstate commerce in *Swift & Co. v. United States*, 196 U. S. 375; *United States v. Patten*, 226 U. S. 525; *United States v. Fergar*, 250 U. S. 199; * * * It is clear from these cases that if Congress deems certain recurring practices, though not really part of interstate

commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint. Again, it has the power to punish conspiracies in which such practices are part of the plan, to hinder, restrain or monopolize interstate commerce. But in the latter case, the intent to injure, obstruct or restrain interstate commerce must appear as an obvious consequence of what is to be done, or be shown by direct evidence or other circumstances."

Chief Justice Taft went on to say, p. 409, "This case is very different from *Loewe v. Lawler* . . . There the gist of the charge held to be a violation of the Anti-Trust Act was the effort of the defendants, members of a trade union, by a boycott against a manufacturer of hats to destroy his interstate sales in hats. The direct object of the attack was interstate commerce."

The Supreme Court applied the criterion of the intent of the strikers to affect interstate commerce without regard to whether or not the actions of the combination in preventing the distribution of coal from the mines, could actually affect the volume of commerce in coal or the price of it. Chief Justice Taft found, p. 412, that the strike was a local strike, "local in its origin and motive, local in its waging, and local in its felonious and murderous ending." The Supreme Court thereupon reversed the judgment rendered against the United Mine Workers and their officers, remanding the cause for further proceedings.

In *Coronado Coal Company v. United Mine Workers of America*, 268 U. S. 295, 310, known as the second Coronado [fol. 1399-11] case, the Supreme Court had additional evidence before it. This evidence included testimony as to the responsibility of union officials for the strike and to the effect that the production of coal of the Bache-Denman mines was more than 5,000 tons a day and not 5,000 tons a week as had been supposed. The Court held that when it was the intent of those interfering with the production of coal . . . to restrain and control the supply of coal moving in interstate commerce . . . this constituted a direct violation of the antitrust laws. Chief Justice Taft concluded by stating, "We think there was substantial evidence at the second trial in this case tending to show that the purpose of the destruction of the mines was to stop the production of non-union coal and prevent its shipment to markets of other States than Arkansas, where it would by

competition tend to reduce the price of the commodity and affect injuriously the maintenance of rates for union labor in competing mines, and that the direction by the District Judge to return a verdict for the defendants other than the International Union was erroneous." The Supreme Court thereupon affirmed the judgment in favor of the International Union of United Mine Workers and reversed that in favor of the district and local unions, remanding the cause for further proceedings.

In *United Leather Workers v. Herkert*, 265 U. S. 457, the complainants had built up valuable business in manufacturing trunks and leather goods and in selling the greater number of these articles in interstate commerce. The bill of complaint expressly alleged that with the intention of ruining this interstate business, a strike was commenced by the United Leather Workers and that this strike was carried on through illegal picketing and intimidation of workers, the strikers being well aware that the products of the complainants when made were shipped through interstate commerce. The Supreme Court held that a mere reduction in the amount of articles to be shipped in interstate commerce and the illegal prevention of their manufacture did not bring the activities of the strikers within the purview of the Sherman Act. The Court by Chief [fol. 1399-12] Justice Taft stated, p. 471, "This review of the cases makes it clear that the mere reduction in the supply of an article to be shipped in interstate commerce, by the illegal and tortious prevention of its manufacture, is ordinarily an indirect and remote obstruction to that commerce. It is only when the intent or necessary effect upon such commerce in the article is to enable those preventing the manufacture to monopolize the supply, control its price or discriminate between its would-be purchasers, that the unlawful interference with its manufacture can be said directly to burden interstate commerce."

In *Levering & G. Co. v. Morrin*, 289 U. S. 103, the complainants were engaged in fabricating and erecting structural iron and steel and attempts were made by unions in the City of New York to compel them to employ only union labor in this work. The bill of complaint alleged that all the steel used by the complainants in the City of New York was transported from other states and that the success of the respondents' efforts would result in the destruction of the complainants' interstate traffic in steel. Mr. Justice

Sutherland delivered the opinion of the Supreme Court and stated, p. 107, "All this, however, is no more than to say that respondents' interference with the erection of the steel in New York will have the effect of interfering with the bringing of steel from other states. Accepting the allegations of the bill at their full value, it results that the sole aim of the conspiracy was to halt or suppress local building operations as a means of compelling the employment of union labor, not for the purpose of affecting the sale or transit of materials in interstate commerce. Use of the materials was purely a local matter, and the suppression thereof the result of a purely local aim. Restraint of interstate commerce was not an object of the conspiracy. Prevention of the local use was in no sense a means adopted to effect such a restraint. It is this exclusively local aim, and not the fortuitous and incidental effect upon interstate commerce, which gives character to the conspiracy. Compare *Bedford Cut Stone Co. v. Stone Cutters Assn.*, 274 U. S. 37, [fol. 1399 13] 46-47; *Anderson v. Shipowners Assn.*, 272 U. S. 359, 363, 364. If thereby the shipment of steel in interstate commerce was curtailed, that result was incidental, indirect and remote, and, therefore, not within the antitrust acts, as this court, prior to the filing of the present bill, had already held."

Further citation of authorities would serve no useful purpose. We therefore turn to the application of the principles enunciated to the case at bar.

The Principles of the Cited Cases as Applied to the Case at Bar.

The evidence in the case at bar, with the possible exception of the instance of the refusal of the appellants to permit finished goods to be shipped which we shall presently discuss, did not disclose an intent on the part of the appellants to restrain commerce. On the contrary their intent was to unionize the appellee's plant, an action local in motive and local in effect. The effect upon interstate commerce was merely indirect, incidental and remote. The appellants therefore were not guilty of engaging in a combination or conspiracy to restrain commerce. *United Mine Workers v. Coronado Coal Co.* (first Coronado case), *supra*; *United Leather Workers v. Herkert*, *supra*; *Levering & G. Co. v. Morrin*, *supra*.

Furthermore, although the appellee did a business in the manufacture and sale of full fashioned hosiery of approximately \$5,000,000 a year, this was a small part of the total industry. In 1936, the annual national shipments of full fashioned hosiery were 37,400,782 dozen pairs. In 1937, the annual national shipments amounted to 39,678,494 dozen pairs. The record shows that during the last eight months of 1937, the appellee shipped 274,791 dozen pairs of stockings. Even if the appellee's output was quadrupled, it would amount to less than three percent of the total national output in the industry. The interruption of production incurred by the appellee through the acts of the appellants [fol. 1399-14] had small effect upon interstate commerce. The combination was not such that by reason of the intent of the conspirators or the inherent nature of their acts public interest was prejudiced by unduly restricting competition or obstructing trade. *Appalachian Coals, Inc., supra*, *Nash v. United States, supra*. It follows, we think, that the appellants were not guilty of violating the Sherman Act in refusing to permit the shipment of completed merchandise to fill orders outside the State of Pennsylvania. The appellees have, however, cited authorities in support of a contrary view, two of which require brief discussion.

In *Buyer v. Guillan*, 271 F. 65, a combination between members of longshoremen's unions resulted in a refusal by longshoremen to handle goods brought to the docks by trucks driven by non-union men. This was held to be a combination in restraint of trade in violation of the Sherman Act and an injunction was issued. In *O'Brien v. United States*, 290 F. 185, a strike was in progress at rolling mills at Newport, Kentucky. The mill management arranged to send a steel billet to a Cincinnati manufacturer. The manufacturer sent a truck to the mill to get the billet. The defendants induced the driver to unload the billet after it had been placed upon the truck, and were indicted under the Sherman Act. The Circuit Court of Appeals of the Sixth Circuit sustained the convictions of the defendants, stating at p. 187, "Not only was the billet 'prepared for delivery and marked', but carriage across the river was in the natural course of business at this point, and it is to be assumed that the truck carried the usual evidence that it was an Ohio car." The court went on to state that " * * * the existence of the offense is found not in the amount of

commerce restrained, but in the direct and absolute character of the restraint."

In both of these cases, the goods were actually in transit and in each case there was a secondary boycott of the kind which the Supreme Court had declared illegal in *Duplex v. Deering*, supra. Such elements are lacking in the case at bar. We do not think these cases controlling.

[fol. 1399-15] The decision of the Supreme Court in *Industrial Association of San Francisco v. United States*, 268 U. S. 64, is illuminating upon this aspect of the case at bar. The defendants had proposed to eliminate trade union domination of the local building industry and had combined to establish open shop employment by causing building permits to be refused to those contractors who would not support the open shop plan. The district court enjoined this plan as a violation of the antitrust laws, and found that permits were to be required for the purchase of building materials and supplies brought from other states into California and that even if limited to California produced materials, the permit system interfered with the free movement of building materials into California. The Supreme Court reversed this decree and ordered the bill dismissed, holding that interferences with materials shipped into California were widely separated and insignificant in view of the size of the local building industry and were therefore insufficient to establish a conspiracy in restraint of commerce.

Mr. Justice Sutherland, delivering the opinion of the Court, said at p. 84, " . . . the interferences which may have been unlawful are reduced to some three or four sporadic and doubtful instances, during a period of nearly two years. And when we consider that the aggregate value of the materials involved in these few and widely separated instances, was, at the utmost, a few thousand dollars, compared with an estimated expenditure of \$100,000,000 in the construction of buildings in San Francisco during the same time, their weight, as evidence to establish a conspiracy to restrain interstate commerce or to establish such restraint in fact, becomes so insignificant as to call for the application of the maxim, *de minimis non curat lex*. To extend a statute intended to reach and suppress real interference with the free flow of commerce among the states, to a situation so equivocal and so lacking in sub-

stance, would be to cast doubt upon the serious purpose with which it was framed."

[fol. 1399-16]. We are of the opinion that the maxim is equally applicable to the appellant's refusal in the case at bar to permit shipments designated for interstate commerce to leave the Apex plant. This action, although clearly wrongful, did not bring their conspiracy within the prohibition of the Sherman Act. The evidence in the case at bar supports but one conclusion, namely that the interruption to commerce was by way of stoppage of the appellee's manufacturing operations, was comparatively slight and indirect, and that the intent and purpose of the appellants at the time of the formation of their conspiracy and thereafter was to unionize the Apex plant, not to restrain commerce or to affect prices within the industry. The verdict was necessarily based on the existence of an intent by the appellants to form a combination in restraint of trade and commerce. The record does not furnish support for the finding of such intent. It follows that the appellee failed to make out a case for treble damages under the Sherman and Clayton Acts, that the learned trial judge should have directed a verdict in favor of the appellants and that he erred in refusing to grant the appellants' motion to set aside the verdict and judgment against them and to enter judgment in their favor.

The National Labor Relations Act and the Decisions Construing it Do Not Expand the Meaning of the Word "Commerce" as Employed in the Antitrust Laws.

This court in its opinion in the injunction suit between these parties reported in 90 F. (2d) 155, 159, reversing the decree of the district court, reported in 20 F. Supp. 138, placed emphasis upon an expanded meaning of the word "commerce" purportedly created by the National Labor Relations Act (29 U. S. C. A. 151-166) and the decisions of the Supreme Court in *National Labor Relations Board v. Jones and Laughlin Steel Corporation*, 301 U. S. 1, and *National Labor Relations Board v. Friedman-Harry Marks Clothing Company*, 301 U. S. 58. The word commerce under this expanded definition was construed to include the activities of the appellants and their agents. We now conclude that this was unwarranted.

Congress used a very broad word, "affect," in the National Labor Relations Act, thus evidencing its intention

to embrace the entire field of interstate commerce confided to it by the Constitution. Upon the other hand in the Sherman Act, Congress employed the word "restraint," which has a different and plainly more restricted connotation. That this is so becomes the more obvious in the light of the Supreme Court decisions which we have already discussed, in which it is declared that Congress intended to legislate only in respect to unreasonable restraints of commerce. In other words, in order to come within the purview of the Sherman Act and thus to confer jurisdiction upon the Federal courts commerce must not only be affected, but also must be restrained and restrained to an unreasonable degree.

A somewhat similar contention was made in *Blankenship v. Kurlman*, 96 F. (2nd) 450, 456, and in respect to it the court stated: "The recent decisions in cases under the National Labor Relations Act are instructive for the purpose of determining whether certain activities affect commerce. But these cases do not involve problems determining the existence of a conspiracy or combination in restraint of commerce." The questions involved in the decisions of the Supreme Court in the Labor Board cases which we have cited were as to the extent of congressional power under the commerce clause of the Constitution. The question presented by the case at bar and by the earlier injunction proceedings is the extent to which Congress has exercised that power in the antitrust laws. The latter question must be decided upon the authority of cases arising under and construing the antitrust laws. The meaning of the words " . . . contract, combination . . . or conspiracy in restraint of trade or commerce" employed in Section 1 of the Sherman Act cannot be expanded by the definitions of the National Labor Relations Act or the cases construing that Act.

[fol. 1399-18]. In the injunction proceedings this court concluded that because the appellants committed unlawful acts they were therefore guilty of a conspiracy in restraint of trade. This conclusion we now think was erroneous. The test is not whether unlawful acts were committed by the appellants but whether a combination or conspiracy was formed by them with the intent to restrain commerce. If such a conspiracy had been formed by them it would be in violation of the Sherman Act though carried out by entirely

lawful and peaceable means. *Duplex Printing Co. v. Deering*, supra, pp. 467, 468.

The decree of this court in *Apex Hosiery Co. v. Leader*, supra, was reversed by the Supreme Court with directions to dismiss the bill of complaint since the case was moot. *Leader v. Apex Hosiery Co.*, 302 U. S. 656. The decree of this court in the injunction proceedings must therefore be considered as having been vacated. It is no longer binding as a precedent, as the law of the case, or as *res judicata*. *South Spring Gold Co. v. Amador Gold Co.*, 145 U. S. 300; *Brownlow v. Schwartz*, 261 U. S. 216. As a consequence we are at liberty to consider anew all questions presented by the record of the case at bar. But if this were not so we would now feel it necessary to overrule our decision in the former case, since, as we have shown, it was erroneous. Our judgment in this respect is confirmed by legal commentators generally. See 51 *Harvard Law Review* 169; 15 *New York University Law Quarterly Review*, 135; 39 *Columbia Law Review* 1247.

The judgment of the court below is reversed and the cause is remanded with directions to enter judgment for the appellants in accordance with Rule 50 (b) of the Federal Rules of Civil Procedure.

A true Copy

Teste:

_____, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 1400] IN UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT MARCH TERM, 1939

No. 7085

WILLIAM LEADER AND AMERICAN FEDERATION OF FULL
FASHIONED HOSIERY WORKERS, (Sometimes known as
American Federation of Hosiery Workers), Philadelphia
Branch No. 1, Local 706, Defendants-Appellants,

vs.

APEX HOSIERY COMPANY, Plaintiff-Appellee.

JUDGMENT—Filed November 29, 1939

On appeal from the District Court of the United States,
for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed, with costs, and the cause remanded to the said District Court with directions to enter judgment for the appellants in accordance with Rule 56 (b) of the Federal Rules of Civil Procedure.

Philadelphia, November 29, 1939.

John Biggs, Jr., Circuit Judge.

[File endorsement omitted.]

[fol. 1401] Petition for Rehearing

Covering 14 pages filed Dec. 20, 1939.

Omitted from this Print.

It was Denied and Nothing more by order of Dec. 27, 1939.

[fol. 1402] IN UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Filed December
27, 1939

And Now, to wit, December 27, 1939, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia.

John Biggs, Jr., Circuit Judge.

[File endorsement omitted.]

[fol. 1403] Clerk's certificates to foregoing transcript omitted in printing.

[fol. 1404] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 26, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(6808)